(19,259.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 202.

ALICE I. BIRRELL, PLAINTIFF IN ERROR,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Remittitur from court of appeals	*a*	1
Case on appeal to court of appeals	*d*	2
Statement under rule 41	1	2
Summons	2	3
Complaint	3	3
Answer of N. Y. & Harlem R. R. Co.	8	6
Decision	23	15
Judgment, January 14, 1901	29	18
Exception to decision	32	20
Notice of appeal to appellate division	33	20
Opinion, Lawrence, J.	34	21
Evidence for plaintiff	35	21
Offers of exhibits	36	22
Plaintiff's Exhibit K—Statement of rents	38	22
L—Statement of rents	39	22
M—Statement of rents	40	22
Further offers of exhibits	41	23
Testimony of George S. Birrell	41	23
Edward H. Peck	53	30
Naphtali A. Millhauser	53	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1905.

	Original.	Print
Testimony of Isabel McMartin	55	31
Mary J. Fegan	56	32
Henry Fincke	58	34
Nora Reilly	59	34
Frank G. Swartwout	60	35
Plaintiff rests	67	39
Motion to dismiss	67	39
Motion denied	70	41
Evidence for defendant	70	41
Offers of exhibits	71	41
Testimony of Charles H. Chambers	72	42
Joseph H. Franklin	73	43
Ezra P. Naylor	75	44
Walter Katte	79	46
Lorenzo S. Palmer	80	47
Motion to strike out denied	83	49
Motion to dismiss renewed	83	49
Plaintiff's Exhibit C—Map of city of New York by commissioners appointed by act of April 3, 1807	85	49
H—Map No. 3	86	49
Defendants' Exhibit 2—Abstract of the papers filed in the proceeding instituted by the N. Y. & Harlem R. R. Co. to acquire lands of Samson A. Benson, an infant, and others	87	50
3—Copy of a part of a map entitled "Profile and map of the Fourth avenue as surveyed for the contemplated Harlem railroad, New York, August, 1831"	103	58
4—Agreement of January 9, 1832, between the N. Y. & Harlem R. R. Co. and city of New York	104	59
16—Plan under act of 1872	110	61
Stipulations as to record	111	62
Order to file record	111	62
Order of affirmance by appellate division	113	62
Judgment of affirmance by appellate division	114	63
Memorandum of affirmance by appellate division	116	63
Notice of appeal to court of appeals	117	64
Stipulation as to record on appeal	119	65
Memorandum opinion of court of appeals	120	65
Order for judgment on remittitur	121	66
Judgment on remittitur	123	66
Assignment of errors	125	67
Petition for writ of error	131	70
Writ of error	136	73
Citation and service	138	74
Bond	139	75
Clerk's certificate	143	79

a STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 24th day of February, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.
W. H. SHANKLAND, Clerk.

Remittitur, February 25th, 1903.

ALICE I. BIRRELL, Respondent,
ag'st
THE NEW YORK AND HARLEM RAILROAD COMPANY and Another, Appellants.

Be it remembered, that on the 25th day of September in the year of our Lord one thousand nine hundred and one The New York and Harlem Railroad Company and another the appellants in this action came here into the court of appeals, by Ira A. Place their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department. And Alice I. Birrell the respondent in said action afterwards appeared in said court of appeals by
b Atwater & Cruikshank her attorneys, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

"That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14 and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this court of appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

Whereupon, the said court of appeals having heard this cause argued by Mr. Ira A. Place of counsel for the appellants, and by Mr. Alfred B. Cruikshank of counsel for the respondent, and after due deliberation had thereon did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and complaint dismissed without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed and complaint dismissed without costs as aforesaid.

c And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 25th, 1903.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

d In the Court of Appeals.

ALICE I. BIRRELL, Plaintiff Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Case on Appeal.

Atwater & Cruikshank, attorneys for plaintiff-respondent, borough of Manhattan, N. Y. city, N. Y.

Ira A. Place, attorney for defendants-appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

1 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Statement under Rule 41.

This action was commenced on January 27th, 1897. The summons and complaint were served on the defendant railroad companies on that day. The answers of the defendant railroad com-

panies were served on the plaintiff on the 29th day of March, 1897. This action was first tried before the Hon. Miles Beach, justice, on the 3d, 4th and 5th days of January, 1899. The defendant railroad companies having appealed from the judgment entered upon the said trial, the appellate division of the supreme court reversed the judgment and ordered a new trial.

The names of the original parties are as they appear in the above-entitled action in full; no change in parties or attorneys has
2 taken place pending the action, except that by an order entered herein on the 17th day of April, 1900, Ira A. Place, Esq., was substituted attorney for the defendants in the place and stead of Frank Loomis, Esq.

Supreme Court, City and County of New York.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated January 25th, 1897.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

Office and post office address, No. 115 Broadway, New York city.

3 Supreme Court, City and County of New York.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Complaint.

The plaintiff complains of the defendants and alleges, upon information and belief:

I. That at all the times hereinafter mentioned each of the defendants was, and now is, a domestic corporation created for the purpose of building, maintaining and operating a steam railroad.

II. That the plaintiff now is, and has been since September 14th, 1893, seized in fee simple and in possession of a lot of land, with the building thereon, situated on the northeast corner of Park avenue and One hundred and twenty-third street, in New York city, bounded and described as follows, viz:

Beginning at the northeast corner of Park avenue and One hundred and twenty-third street and running thence thirty-five (35) feet easterly along the northerly side of One hundred and twenty-third street; thence northerly and parallel with the easterly side of Park avenue one hundred (100) feet eleven (11) inches to the middle
4 of the block; thence westerly and parallel with the northerly side of One hundred and twenty-third street thirty-five (35) feet to the easterly side of Park avenue, and thence southerly along the easterly side of Park avenue one hundred (100) feet and eleven (11) inches to the point or place of beginning.

III. The said Park avenue in the city of New York (formerly known as Fourth avenue) is and has been since prior to the year 1870 a public street in said city, and was, prior to the year 1870, opened and established as a public street of the city of New York by proceedings taken under and in accordance with an act of the legislature of the State of New York, passed April 9th, 1813, being chap. 86 of the Laws of 1813, entitled "An act to reduce several laws relating particularly to the city of New York in to one act," and the statutes amendatory of and supplemental to said act.

IV. By virtue of the proceedings so taken under said statutes above mentioned, the title to said Park avenue was acquired and has always been and is now held by the city of New York, in trust that the same be appropriated and kept open for or as part of a public street, avenue or place forever, and the plaintiff's predecessors in title to the premises above mentioned were, during the time of their respective seizin and possession, thereof and plaintiff, since her seizin and possession of the same, has been and now is seized and possessed of an easement appurtenant to said premises to have the said Park avenue kept open and used only as a public street or avenue, in like manner as other public streets and avenues in the city of New York were when said avenue was laid out and opened and now are and of right ought to be used; and since said Park avenue was opened and established as a public street aforesaid, there have been
5 and now are attached to said premises above mentioned, and appurtenant thereto, easements of light, air and access in and over Park avenue, for the benefit of said premises and of plaintiff.

V. That prior to April 1st, 1873, the defendant The New York and Harlem Railroad Company had constructed and was operating a steam railroad over the surface of Park avenue, in front of said premises, and on or about April 1st, 1873, the said New York and Harlem Railroad Company leased to the defendant The New York Central and Hudson River Railroad Company its said railroad on said Park avenue, and all its rights therein for the term of four hundred and one years.

VI. That subsequent to said lease, the defendants, without right or authority as against the plaintiff or her predecessors in title, excavated the said Park avenue in front of the premises above mentioned, and constructed in the cut or depression formed by such excavation a railway, with numerous tracks, for the operation of a steam railroad, and the defendants, for more than six years past, have maintained upon that portion of Park avenue which is subject to plaintiff's easements as aforesaid, said railway in said cut or depression, with walls of masonry extending above the surface of said portion of said avenue, and at the present time said railway is, and for more than six years past has been, operated by trains drawn by steam engines, and under the said lease said railway is and has been maintained and operated as aforesaid for the benefit of both defendants.

VII. That in or about April, 1893, defendants began constructing, and have since continued to construct, and have in part erected and since maintained upon that portion of Park avenue, which is
6 subject to plaintiff's easements as aforesaid, a permanent elevated railway structure of iron and steel, supported by columns of iron and steel, standing on pedestals of masonry embedded in the soil of said avenue. The said structure rises many feet above the surface of said avenue, and substantially and materially interferes with and impairs the easements of light, air and access as aforesaid appurtenant to the premises of plaintiff.

VIII. The defendants threaten and intend to maintain said elevated railway structure and to add thereto and enlarge and strengthen the same, and upon completion thereof to operate thereon trains of cars, drawn by steam engines, and the defendants intend to permanently maintain and operate the said structure for the uses and purposes of a steam railroad.

IX. That by reason of the said acts of the defendants the easements appurtenant to plaintiff's said premises have been trespassed upon and injured, and the said premises have been deprived of light, air and access and the privacy thereof invaded, and the stability of the buildings thereon impaired, and the damages already sustained by the plaintiff, in consequence thereof, amount to the sum of five thousand (5,000) dollars, besides which, the fee value of plaintiff's premises has been greatly diminished thereby.

X. That said additions to and enlargement of said elevated railway structure and the running of trains thereon as aforesaid will, to a still greater extent, deprive said premises of light, air, access, privacy, stability, quiet and other rights, and the easements appurtenant to said premises as aforesaid will be still further appropriated by the defendants and still greater and additional damages
7 will be inflicted upon said premises, and the injuries hereinbefore described will be greatly increased and intensified.

XI. That said acts of the defendants have been, are and will be without warrant of law, without consent of plaintiff and without compensation to her, and that the said acts and the injuries com-

plained of are and will be constant and continuous trespasses upon plaintiff's property and rights aforesaid, and to prevent a multiplicity of suits and to afford plaintiff adequate relief, the equitable interference of this court is necessary.

Wherefore plaintiff demands judgment:

(1.) For the sum of five thousand ($5,000) dollars, as and for damages for the trespasses committed by defendant-, as above stated.

(2.) For an injunction perpetually enjoining and restraining the defendants, and each of them, from further maintaining or operating the above described elevated railroad in front of plaintiff's premises, and a judgment directing the removal thereof.

(3.) For such other and further relief as may be just, with the costs of this action.

ATWATER & CRUIKSHANK,
Plaintiff's Attorneys.

CITY AND COUNTY OF NEW YORK, ss.:

Alice I. Birrell, being duly sworn, says: That she is the plaintiff herein; that she has read the foregoing complaint, and the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

ALICE I. BIRRELL.

Sworn to before me this 25th day of January, 1897.

[SEAL.]

F. B. FRENCH,
Notary Public, N. Y. Co.

8 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and THE NEW York Central & Hudson River Railroad Company, Defendants.

First.

The separate answer of the defendant The New York & Harlem Railroad Company herein:

1. Admits the allegations of the complaint contained in the paragraph thereof numbered "I."

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint contained in the paragraphs thereof numbered "II.," "IX.," and "X."

3. Admits that certain portions of Park avenue are a public street, and that such portions were prior to the year 1870 a public street, and that such portions were prior to the year 1870 opened and established as a public street by the city of New York by proceedings

taken under and in accordance with an act of the legislature of the State of New York, passed April 9th, 1813, being chapter 86 of the Laws of 1813, entitled "An act to reduce several laws relating
9 particularly to the city of New York into one act," and the statutes amendatory of and supplemental to said act, and alleges that whatever title the said city acquired to the land between the exterior lines of Park avenue was subject nevertheless to all the rights of the defendant The New York & Harlem Railroad Company to maintain and operate its railroad existing in Park avenue at the time said proceedings were taken, and also to the rights of said company to maintain and operate any railroad therein which might, by subsequent direction and authority of the legislature of the State of New York, be constructed in said Park avenue, and denies any knowledge or information sufficient to form a belief as to each and every other allegation of the complaint contained in the paragraph thereof numbered "III."

4. Admits that by virtue of the proceedings taken under the provisions of said chapter 86 of the Laws of 1813, and the acts amendatory thereof and supplemental thereto, the title to a portion of the land contained between the exterior lines of Park avenue was required, and always has been, and is now held by the city of New York in trust as part of a public street, but denies that any portion of the land between the exterior lines of Park avenue heretofore used and occupied, or now or hereafter to be used and occupied, for the purposes of the railroad of the defendant The New York and Harlem Railroad Company, was acquired by said city in trust, that the same be appropriated and kept open for or as part of a public street, avenue or place forever, and denies any knowledge or information sufficient to form a belief as to each and every other allegation contained in the complaint in the paragraph thereof numbered "IV."

5. Admits the allegation of the complaint contained in
10 the paragraph thereof numbered "V.," that prior to April 1st, 1873, and prior to the year 1853 and the opening of Park avenue as a public street, the defendant The New York and Harlem Railroad Company had constructed and was operating a steam railroad within the lines of Park avenue, as shown on a map thereof made and filed pursuant to chapter 115 of the Laws of 1807, in front of said premises, and admits that on or about April 1st, 1873, the said The New York and Harlem Railroad Company leased to the defendant The New York Central and Hudson River Railroad Company all its said railroad north of 42d street, in the city of New York, for the term of four hundred and one years, but for the full purport and effect of the said lease this defendant begs leave to refer to the said lease with the same force and effect as if the said lease, or a copy thereof, were hereto annexed and formed a part of this answer.

6. Denies the allegation of the complaint contained in the paragraph thereof numbered "VI.," that subsequent to said lease the de-

fendants without right or authority as against the plaintiff or her predecessors in title, excavated the said Park avenue in front of the premises therein mentioned, and constructed in the cut or depression formed by such excavation, a railway with numerous tracks for the operation of a steam railway, and denies that the defendants for more than six years past have maintained upon that portion of Park avenue, which is subject to plaintiff's easements, a railroad with solid walls of masonry extending many feet above the surface of said portion of Park avenue, but admits and alleges that defendants have for more than twenty years prior to the commencement of this action, maintained a railroad over, through and upon a strip of land between 42d street and
11 the Harlem river, and in front of the premises described in the complaint, on each side of which is a public street known as Park avenue, and that said railroad over certain portions of said strip of land is constructed in a depression or cut, and that said railroad is, and for many years past has been, operated by trains drawn by steam engines; that under the said lease from this defendant to the defendant The New York Central and Hudson River Railroad Company said railroad has been maintained and operated by the defendant The New York Central and Hudson River Railroad Company, pursuant to the statutes of the State of New York in such case made and provided, and in accordance with the terms of the said lease.

7. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VII.," except that this defendant admits that the structure therein described rises above the surface of Park avenue, but denies that the same rises many feet above the surface thereof.

8. Denies the allegation of the complaint contained in the paragraph thereof numbered "VIII.," that this defendant threatens and intends to maintain said elevated railway structure, and to add thereto and to enlarge and strengthen the same, and upon completion thereof to operate trains of cars thereon, drawn by steam-engines, and that this defendant intends to permanently maintain and operate the said structure for the uses and purposes of a steam railroad.

9. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "XI."

10. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint not hereinbefore or hereinafter specifically controverted or admitted.

12 Second.

For a further second and separate defense this defendant alleges upon information and belief, that prior to the commencement of this action, and on or about the 21st day of November, 1883, George W. Rogers, then the alleged owner of the premises described in the complaint herein, executed, duly acknowledged and delivered to

the Emigrant Industrial savings bank, a mortgage upon the premises described in the complaint herein to secure the payment of a large sum of money, to wit, the sum of $32,500.00, with interest, that the said mortgage was duly recorded in the office of the register of the city and county of New York, and that the same remains undischarged of record, and that the owner thereof has not been made a party to this action, and that on or about the 25th day of November, 1895, Alice Isabel Birrell, then the alleged owner of the said premises, executed, duly acknowledged and delivered to Frederick W. Pitcher, a mortgage upon said premises to secure the payment of a large sum of money, to wit, the sum of $2,750.00, with interest, that the said mortgage was duly recorded in the office of said register, and that the same remains undischarged of record, and that the owner thereof has not been made a party to this action.

Third.

For a further third and separate defense the defendant The New York and Harlem Railroad Company alleges upon information and belief:

That pursuant to the provisions of an act of the legislature of the State of New York, entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York and for other purposes," passed April 3d, 1807, and
13 known as chapter 115 of the Laws of 1807, a map or plan exhibiting the public streets and avenues of the city of New York was duly made and filed April 1, 1811, exhibiting among other avenues, Fourth avenue, of the width of one hundred feet, extending from the southerly side of the Harlem river to and below Forty-second street.

That by the provisions of an act of the legislature, entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831, and known as chapter 263 of the Laws of 1831, the defendant The New York and Harlem Railroad Company was incorporated and was authorized, among other things, to construct a railroad from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, and that pursuant to the requirements of said act the defendant The New York and Harlem Railroad Company, duly located the route of said railroad and made a survey of such location and filed a map thereof in the register's office of the city and county of New York on the 22d day of October, 1831, the said map having been approved by a joint resolution of the common council, approved by the mayor, October 11, 1831, declaring their approval of the map and of the route of said railroad indicated thereon; that said railroad, as located as aforesaid, occupied a strip of land twenty-four feet in width extending from Twenty-third street to the Harlem

river, the centre line of said strip coinciding with the centre line of Fourth avenue as laid down on said map, filed April 1, 1811.

That subsequently, and on the 22d day of December, 1831, the mayor approved an ordinance passed by the board of aldermen on the 16th day of December, 1831, and by the board of assistants
14 on the 19th day of December, 1831, granting permission to said New York and Harlem Railroad Company to construct a railroad from Twenty-third street to the Harlem river, along Fourth avenue, in conformity with said map, and that said company, by articles of agreement executed January 9th, 1832, duly covenanted to perform all the conditions and requirements contained in said ordinance.

That after the incorporation of the defendant The New York and Harlem Railroad Company, and prior to the acquisition by the city of New York of any title to any part of Fourth avenue, north of Forty-second street, the defendant The New York and Harlem Railroad Company acquired title in fee for the purpose of constructing and operating its railroad thereon to a strip of land extending southerly from the southerly line of the Harlem river to Forty-second street, a portion whereof is in front of the premises described in the complaint, of the width of twenty-four feet, situate within the exterior lines of Fourth avenue, as designated on said map or plan, the centre line thereof coinciding with the centre line of said Fourth avenue, and also the right to slope any embankment or excavation of its railroad structure to the exterior lines of the said Fourth avenue; and that many years prior to the acquisition of any title by the city of New York to any part of Fourth avenue, the defendant The New York and Harlem Railroad Company, had constructed its railroad structure and had in operation its railroad upon the same, and its roadway acquired as aforesaid, and upon, along, above and below the grade of the adjacent land, and continued the operation of its railroad upon its railroad structure, as so located and constructed, until the changes required by the provisions
15 of chapter 880 of the Laws of 1867, and by the provisions of chapter 702 of the Laws of 1872, as hereinafter set forth, were successively made.

That pursuant to the provisions of an act of the legislature, passed upon the memorial of the mayor, aldermen and commonalty of the city of New York, therefor, and entitled "An act to alter the map or plan of the city of New York," passed April 27th, 1837, and known as chapter 274 of the Laws of 1837, said Fourth avenue was widened to the width of one hundred and forty feet, and the said widening from one hundred to one hundred and forty feet was by reason of the location and characteristics of the railroad and railroad structures theretofore built by the defendant The New York and Harlem Railroad Company, entending between Forty-second street and the Harlem river, and was for the purpose of giving an avenue of the necessary width for the increasing needs and population of the city of New York.

That the aforesaid acquisition of title by said defendant, The New York and Harlem Railroad Company, with the right to slope any embankment or excavation for its railroad structure to the exterior lines of said Fourth avenue, at that time one hundred feet in width as aforesaid, and the aforesaid construction by this defendant The New York and Harlem Railroad Company, of its railroad structure, and the aforesaid operation of its railroad upon the same and its roadway, was many years prior to the alleged acquisition by the plaintiff of title (if she acquired any title) to the premises described in the complaint, and to the erection of any building or buildings on said lands, and such acquisition of title, right of construction and operation of said railroad was pursuant to and by authority of said act of incorporation of said defendant The
16 New York and Harlem Railroad Company, and of the acts amendatory thereof and supplemental thereto, and with the consent and acquiescence of the predecessor or predecessors in title (if the plaintiff has any) of the plaintiff.

That pursuant to the provisions of section six of an act of the legislature entitled "An act to amend an act entitled 'An act relating to the New York and Harlem Railroad Company,' passed May 7, 1840, and the acts amending the same," passed March 29th, 1848, and known as chapter 143 of the Laws of 1848, the New York and New Haven Railroad Company (now known as the New York, New Haven and Hartford Railroad Company), a railroad corporation organized under the laws of the State of Connecticut, acquired from said defendant The New York and Harlem Railroad Company, the right to run the cars of the said New York and New Haven Railroad Company upon the tracks of said defendant The New York and Harlem Railroad Company, from a point of junction near Williams bridge, to and into the city of New York, and did, and every since the year 1848 has, run its cars and trains upon the railroad of said defendant The New York and Harlem Railroad Company, from said point of junction to and along and upon said tracks from the southerly side of the Harlem river to Forty-second street.

That by proceedings instituted by the mayor, aldermen and commonalty of the city of New York, in or about the year 1850, for the opening of Fourth avenue (now known as Park avenue) from Thirty-eighth street to the Harlem river, resulting in an order of confirmation entered October 29th, 1853, the said city assumed to acquire title to the land between the exterior lines of Fourth avenue from Thirty-eighth street to the Harlem river, subject, nevertheless,
17 to all the rights of the defendant The New York and Harlem Railroad Company, to maintain and operate its said railroad in said avenue.

That on the 10th day of May, 1867, the legislature passed an act entitled "An act for the protection of persons traveling upon Fourth avenue in the city of New York," and known as chapter 880 of the Laws of 1867, which in terms required and provided that the defend-

ant The New York and Harlem Railroad Company should do certain work and perform certain acts, and among other things, that it should erect retaining walls upon the sides of its railroad below Ninety-second street, and between Seventy-eighth and Eighty-eighth streets, surmount said retaining walls with iron railing, and arch over its roadway from Eighty-eighth street to Ninety-second street, and that the city of New York should pay to the defendant The New York and Harlem Railroad Company one-half of the expense thereof, and that the filling in and grading about the said arch should be done by the city of New York, at its sole expense; and this defendant alleges that all the work and acts required to be done by said last mentioned act were duly performed.

That on the 14th day of May, 1872, the said legislature passed an act entitled "An act to improve and regulate the use of Fourth avenue in the city of New York" and known as chapter 702 of the Laws of 1872, whereby an established statutory grade and roadway between Forty-fifth street and the Harlem river were provided for the said railroad of the defendant The New York and Harlem Railroad Company, and whereby said defendant was required to construct such viaducts, foot and road bridges over the same and such excavations and tunnels under the same, with openings for proper ventilation,
18 as should be required by the plans and specifications of a board of engineers appointed by said act to execute, direct and superintend the said improvement; and also requiring one-half the cost of said improvement to be paid by the city of New York. That said improvement was accordingly carried out and the requirements of said act fully complied with and the railroad structure mentioned in the complaint as existing in front of the premises discribed in the complaint prior and up to the month of April, 1893, was constructed and has since been maintained and operated by the defendants pursuant to said last mentioned act.

That on the first day of April, 1873, said defendant The New York and Harlem Railroad Company leased all of its railroad from Forty-second street northwardly to the defendant The New York Central and Hudson River Railroad Company for a term ending April 1st, 2274, and that the said defendant The New York Central and Hudson River Railroad Company entered into possession and is now in the sole occupation and enjoyment of the said demised premises.

That on the 19th day of April, 1892, the said legislature passed an act entitled, "An act to regulate, improve and enlarge Park avenue above 106th street, in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, street or railroads that may be necessary by reason of such change in structure and grade and increased ele-

vation of bridges, and for other purposes," and known as chap-
19 ter 339 of the Laws of 1892; that said act was duly amended by an act of said legislature, passed May 8th, 1894, and known as chapter 548 of the Laws of 1894, and was also further amended by an act of said legislature passed May 13th, 1896, and known as chapter 594 of the Laws of 1896.

That under and pursuant to the provisions of section 13 of said act, chapter 339 of the Laws of 1892, the board therein designated as "the board for the Park Avenue improvement above One hundred and sixth street," was duly appointed by the mayor of the city of New York, on or prior to the 29th day of April, 1892, was duly organized as required in said act on that date, and thereupon proceeded to and took entire charge and control of the improvement directed in said act, and still has entire charge and control of the same; that pursuant to the authority vested by said act as amended as aforesaid, and in obedience to its explicit directions, the said board entered into and executed certain contracts with various parties for the construction and carrying out of said improvement, according to certain plans prepared by said board, approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, and that all the structures described in the complaint, including all temporary structures, required in the construction of said improvement, or necessary for the operation of trains during the making of said improvement, have been erected by such contractors under the sole supervision and control of said board, and in part at the expense of the mayor, aldermen and commonalty of the city of New York, as required by said act as amended as aforesaid, and that all the provisions of said chapter 339 of the Laws of 1892, as amended, have been and are being duly carried out and executed.

20 That all the changes in the original railroad bed and structures of the defendant The New York and Harlem Railroad Company, which have been or are being made, including all temporary structures, were and are necessary and requisite in order to carry out the provisions of the said acts, and were necessary and required for the purpose of and in order to regulate, improve and enlarge Park avenue in accordance with the provisions of the said acts, and that the defendant The New York and Harlem Railroad Company, has not operated any trains on said structure, or any part of it, temporary or otherwise.

Fourth.

For a further fourth and separate defense the defendant The New York and Harlem Railroad Company alleges, upon information and belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court.

Fifth.

For a further fifth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to her predecessor or predecessors in title within twenty years next preceding the commencement of this action.

Sixth.

For a further sixth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pre-
21 tended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to her predecessor or predecessors in title within ten years next preceding the commencement of this action.

Seventh.

For a further seventh and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to her predecessor or predecessors in title within six years next preceding the commencement of this action.

Eighth.

For a further eighth and separate defense the defendant The New York and Harlem Railroad Company alleges:

That it entered into possession of that part of Park (formerly Fourth) avenue in front of, or adjacent to, the premises claimed to be owned by the plaintiff, which is now and heretofore has been occupied by the railroad and railroad structure of the defendant The New York and Harlem Railroad Company, under a claim of title, exclusive of any other right, founding such claim upon a written instrument or instruments as being a conveyance or conveyances of said premises or of the right, franchise and easement to construct, maintain and operate railroads thereon, and that there has been a continued occupation, possession and use of the said franchises, rights and easements included in said written instrument or instruments, or of some part thereof, by the defendant The New York and Harlem Railroad Company, and the defendant The New York Cen-
22 tral and Hudson River Railroad Company, under said lease, for twenty years next preceding the commencement of this action, under the same claim.

Wherefore, the defendant The New York and Harlem Railroad Company demands that the complaint be dismissed, with costs.

FRANK LOOMIS,
Attorney for the Defendant, The New York and Harlem Railroad Company.

Office and post-office address, Room 10, Grand Central depot, 42d St. and Vanderbilt Ave., New York city, N. Y.

CITY AND COUNTY OF NEW YORK, ss:

Edward V. W. Rossiter, being duly sworn, says that he is the treasurer of The New York and Harlem Railroad Company, the above-named defendant; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 23d day of March, 1897.

H. B. DWYER,
Notary Public, New York County.

The separate answer of the New York Central and Hudson River Railroad Company contains substantially the same allegations as the separate answer of the New York and Harlem Railroad Company.

23 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Decision.

The issues in the above-entitled action having heretofore duly come on for trial before the Hon. Frederick Smyth, one of the justices of this court, on the 7th and 8th days of May, 1900, and the respective parties having appeared and the cause having been duly tried and the said justice having thereafter died, leaving the cause undetermined, and the same thereafter regularly coming on for trial before the Hon. Abraham R. Lawrence, one of the justices of this court, on the 5th day of November, 1900, and the respective parties having thereupon upon said trial stipulated in writing and in open court that the case be submitted for decision to the said justice on the evidence as appearing in the stenographer's minutes of

the testimony, and upon the exhibits used and put in evidence upon the said former trial before Mr. Justice Smyth, and upon the complete record of said trial, with the same force and effect as if the said justice had presided at the time of the former trial, and that all said evidence and testimony was to be considered as being
24 taken before said trial justice *nunc pro tunc*, as of the dates of May 7th and 8th, 1900, and the submission having been made and the second trial having been had accordingly, and the said original records, exhibits, evidence and testimony having been duly read and submitted, and the same having been duly considered,

Now, therefore, I, the said Abraham R. Lawrence, trial judge, do make this decision stating concisely the grounds upon which the issues herein are decided, as follows:

First. The plaintiff is, and since September 13, 1893, has been, the owner and in possession of the premises described in the complaint and situated on the northeast corner of Park avenue and 123d street, having a frontage of one hundred feet and eleven inches on said Park avenue, and has had during the period of her ownership as aforesaid certain easements of light, air and access in Park avenue and appurtenant to her said premises.

Second. During all the times herein mentioned the defendant The New York and Harlem Railroad Company was the owner of the railroad and railroad structures in Park avenue, in front of the plaintiff's premises, and the defendant The New York Central and Hudson River Railroad Company was at all times the lessee of said railroad and structures under a lease, dated April 1st, 1873, for a period of 401 years from said date.

Third. Said railroad prior to August, 1894, was operated along the centre of said avenue, in front of the plaintiff's premises, in a depressed cut, which was about fifteen feet in depth and about fifty feet in width at the bottom, with a slope of retaining walls, which increased the width of the cut to fifty-two feet at the top, surmounted with a parapet wall.

25 Fourth. That by proceedings duly had in the court of chancery of the State of New York, entitled, In the matter of the petition of the New York and Harlem Railroad Company, in relation to certain lands, &c., and by a decree entered therein dated December 28th, 1832, the said defendant The New York and Harlem Railroad Company, became the owner in fee of a strip of land twenty-four feet wide in front of plaintiff's premises, running north and south through the centre of Park avenue, and that upon this strip and within its boundaries the defendant had the right to erect the viaduct structure as at present erected on said Park avenue, and to use the same for the purpose of a railroad, and I further find that under and by virtue of the charter of the defendant, The New York and Harlem Railroad Company, and the acts amendatory thereof and supplemental thereto, the various resolutions, consents, ordinances and acts of the mayor, aldermen and commonalty of the city of New York, the said decree of the court of chancery, the proceed-

ings in the supreme court in the matter of the application of the mayor, aldermen, and commonalty of the city of New York relative to the opening of Fourth avenue; the various acts of the legislature upon which said proceedings were taken; also chapter 702 of the Laws of 1872, and the acts performed by the defendants thereunder, the lease of the New York and Harlem Railroad Company to the New York Central and Hudson River Railroad Company, dated April 1st, 1873, and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or her predecessors in title, the said defendant railroad companies acquired the right without
26 liability to the plaintiff to have, maintain and use their railroad and railroad structures over the remainder of said bed or roadway of fifty feet or thereabouts, as the same were maintained and used prior to August, 1894, as hereinbefore described.

Fifth. In compliance with and pursuant to chapter 339 of the Laws of 1892, and under the supervision of the board of the Park Avenue improvement above 106th street, the following changes and alterations were made: The masonry walls and parapets along said Park avenue were removed, the cut was filled up and a new permanent viaduct railroad structure of iron and steel was erected in the place thereof in front of plaintiff's premises, being about twenty-one feet nine inches in height and sixty feet ten inches in width at the southerly end of plaintiff's premises, and seventy-five feet and three and one-half inches in width at the northerly end of plaintiff's premises. Said defendant began to operate its trains on said permanent structure on February 16th, 1897, and intends to permanently continue said operation. The said permanent structure and the operation of trains thereon outside of the twenty-four foot strip are, and since February 16th, 1897, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to said premises.

Sixth. By reason of the maintenance and operation of defendants' railroad in front of plaintiff's premises on that part of the roadway not included in the strip of twenty four feet, which said railroad owns in fee as aforesaid, the fee value of said premises on May 8th, 1900, was depreciated in the sum of $7,050, and the rental value of said premises was from the same cause depreciated in the
27 period from February 16th, 1897, down to May 8th, 1900, in the sum of $3,360; that is to say, that the rental value of said premises was depreciated in said period to the amount of $3,360 below what it would have been had the change and alteration made under the statute of 1892, as aforesaid, been confined to said twenty-four foot strip; and the fee value of said premises was on May 8th, 1900, the date of the trial, permanently depreciated to the amount of $7,050 below what would have been the said value had such change and alteration been confined to said strip. In assessing such damage and depreciation I have considered all benefits conferred on said premises by said changes and alterations.

The plaintiff is entitled to judgment as follows:

I. To a money judgment against the defendants for the sum of $3,360, with interest thereon from May 8th, 1900, to the date of the entry of judgment.

II. To an injunction restraining the defendants from the further maintenance and operation of the said structure and railroad in front of the plaintiff's premises on the northeast corner of Park avenue and 123d street above mentioned, outside of the twenty-four foot strip as aforesaid, but said injunction shall not become operative until thirty days after the notice of entry of judgment herein, and if during the said period the defendants or either of them shall pay or tender to the plaintiff the sum of $7,050 and interest thereon from May 8th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated and to receive from the plaintiff a proper grant and conveyance of such right, together with a release
28 of all claims for damages on account of the maintenance and operation of said structure and railroad as aforesaid since May 8th, 1900, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.

In case the defendants do not within such time acquire the right as against the plaintiff as owner of said premises to maintain and operate their structure and railroad as aforesaid, the injunction shall become operative.

I direct the entry of a judgment as above with the costs of the action and an extra allowance of $570.50.

Dated New York, January 14, 1901.

ABRAHAM R. LAWRENCE, J. S. C.

29 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK & HARLEM RAILROAD COMPANY and The New York Central & Hudson River Railroad Company, Defendants. } Judgment.

The issues in the above-entitled action having been regularly brought on for trial before the Hon. Abraham R. Lawrence, at a special term of this court, held on the 5th day of November, 1900, and said justice having made and filed his decision directing judgment in favor of the plaintiff and against the defendants, as hereinafter stated, and the plaintiff's costs having been duly taxed at the sum of $983,85/100.

Now, on motion of Atwater & Cruikshank, plaintiff's attorneys, it is adju-ged,

I. That the plaintiff, Alice I. Birrell, recover of the defendants,

The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of $3,360 as damages from the trespasses of the defendants upon the premises on the northeast corner of Park avenue and 123d street, New York city, for the period from February 16th, 1897, to May 8th, 1900, with interest thereon from May 8th, 1900, to the date of the
30 entry of this judgment, amounting to the sum of $140; also the sum of $983.85/100 for plaintiff's costs in this action, amounting in all to the sum of $4,483.85/100, and that plaintiff have execution therefor.

II. That the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of said viaduct structure and railroad in front of the plaintiff's premises, northeast corner of Park avenue and 123d street, outside of the twenty-four foot strip in the centre of said avenue, but said injunction shall not be operative until thirty days after notice of entry of judgment herein, and if during said period the defendants or either of them shall pay or tender to the plaintiff the sum of $7,050 with interest thereon from May 8th, 1900, the defendants shall be entitled to maintain and operate said structure and railroad in the future as it is at present maintained and operated and to receive from the plaintiff a proper grant and conveyance of such right, together with a release or releases of all claims for damages on account of the maintenance and operation of said structure and railroad since May 8th, 1900, to be executed by all persons having any title to or lien upon said premises at the time of the execution and delivery thereof.

In case the defendants do not within such time acquire the right as against the plaintiff as owner of said premises, to maintain and operate their structure and railroad, the injunction shall become operative.

III. Any and every tender of delivery, notice or payment herein provided for shall be made by or to the attorneys for the respective parties.

IV. Every party to this action shall have leave to move at the foot of this judgment for further direction.

31 V. No execution shall issue upon the money judgment herein until thirty days aftor the notice of entry of judgment.

Dated New York, January 14, 1901.

Enter.

ABRAHAM R. LAWRENCE, J. S. C.

WILLIAM SOHMER, Clerk.

32 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants. } Exception to Decision.

Please take notice that the defendants, and each of them, hereby except to the decision filed herein on the 18th day of January, 1901, and to each and every part of the same.

Dated, borough of Manhattan, New York city, January 24, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, N. Y. city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, N. Y. city, N. Y.

33 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants. } Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the 18th day of January, 1901, and from each and every part of said judgment.

Dated New York, January 24, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Atwater & Cruikshank, Esqs., attorneys for plaintiff, 115 Broadway, New York city, N. Y.; William Sohmer, Esq., county clerk of New York county, county court-house, borough of Manhattan, New York city, N. Y.

34 Supreme Court, Special Term, Part IV.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Opinion.

LAWRENCE, *J.*:

In this case I am of the opinion that the plaintiff has sustained fee damage in the sum of $7,050, and the rental damage in the sum of $3,360. In reaching this conclusion I have taken into consideration the fact that the Harlem railroad had acquired title in fee simple to the strip of land twenty-four feet in width in Fourth (now Park) avenue in December, 1832, and that said avenue has always been used as a railroad street, and also the evidence with reference to the impairment of the easements appurtenant to the property of the plaintiff caused by the additional burden imposed upon the avenue by reason of the maintenance and use of the structure of the railroad company outside of and beyond the said strip of twenty-four feet, and all the evidence tending to show any impairment of the fee and rental value of the plaintiff's property arising from any other cause than the maintenance and use of such structure. The plaintiff is entitled to the costs of the action. Draw decision and judgment accordingly, and settle on three days' notice.

35 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

The issues thus joined were tried the second time before the Honorable Frederick Smyth, justice, at a special term, part IV., without a jury, on the 7th and 8th days of May, 1900. Justice Smyth having died without rendering any decision in the case the same was, by consent of both parties, submitted to the Honorable Abraham R. Lawrence, justice, upon the record made upon the trial before the Honorable Frederick Smyth, to decide with the same force and effect as if tried before him.

Alfred B. Cruikshank, Esq., and J. E. C. Thomson, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

It is admitted that this action was begun January 27th, 1897.

It is also admitted that the premises in suit formed a portion of lands which in 1830 were vested in Samson Adolphus Benson, at that time an infant.

36 It is stipulated that by various mesne conveyances the title was transmitted from Samson Adolphus Benson to Arthur W. Moore, who acquired title June 16th, 1893.

Plaintiff's counsel offered in evidence deed, from Arthur W. Moore and wife to Alice I. Birrell, dated September 13, 1893, recorded September 14th, 1893, in section 6, Liber 17 of Conveyances, page 212, the expressed consideration being $65,000 and conveying the premises in suit.

Received and marked "Plaintiff's Exhibit A."

Plaintiff's counsel offered in evidence chapter 115 of the Laws of 1807; also chapter 86 of the Laws of 1813; also chapter 274 of the Laws of 1837.

Received and marked "Plaintiff's Exhibits B, D and E."

Plaintiff's counsel offered in evidence a map prepared by the commissioners for the laying out of streets in the city of New York, filed April 1st, 1811.

Received and marked "Plaintiff's Exhibit C" (printed in appendix).

Also proceedings in the matter before the supreme court, entitled "In the matter of the mayor, aldermen and commonalty of the city of New York relative to the opening of Fourth avenue from 38th street to the northerly line or side of 135th street in the twelfth and eighteenth wards of said city."

Received and marked "Plaintiff's Exhibit F."

Also petition in said proceeding, the affidavits, the application, the rule for the appointment of commissioners, certain objections made by the New York and Harlem R. R. Co. and the re-

37 port of the commissioners, the final order confirming the report of the commissioners, entered November 15th, 1853, and the order of the general term affirming the order confirming the report, dated May 15th, 1854.

Received and marked "Plaintiff's Exhibit G."

Also damage map in said proceeding showing the New York and Harlem Railroad Co. as the owner of parcel 1080, consisting of a strip 24 feet wide in the centre of Park avenue, extending from the centre of 123d street to the centre of 124th street.

Received and marked "Plaintiff's Exhibit H" (printed in appendix).

It is admitted that an award of one dollar was made in the above-entitled proceeding to the New York and Harlem Railroad Company for said parcel 1080.

Plaintiff's counsel offered in evidence a statement of the rents collected from the premises in suit from June, 1884, to March, 1889.

Received and marked "Plaintiff's Exhibit K," and is as follows:

(Here follow tables marked pp. 38, 39, and 40.)

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41 Plaintiff's counsel offered in evidence photograph of the premises in suit and of the structure adjoining same, taken from the south side of East 123d street on May 5th, 1900.

Received and marked "Plaintiff's Exhibit N."

Also photograph of the structure in suit, taken from the westerly side of Park avenue to the south of 123d street on May 5th, 1900.

Received and marked "Plaintiff's Exhibit O."

Also photograph of the premises in suit and of the structure, taken from the easterly side of Park avenue to the south of 123d street.

Received and marked "Plaintiff's Exhibit P."

Also sketch or diagram showing the floor plan of the premises in suit.

Received and marked "Plaintiff's Exhibit Q."

GEORGE S. BIRRELL, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am the husband of the plaintiff in this case, and reside at 101 East 123d street, on the premises in question. I have had charge of the premises since they were bought, but had an agent part of the time. So far as the building is concerned I have had charge of it, and I attended to the purchase of it for the plaintiff originally. I remember when the property was bought in 1893; I had been there several times before.

I remember the Harlem railroad as it was operated in 1892, and prior thereto.

42 Q. Will you kindly describe the premises in question in a general way?

A. They are situated on the northeast corner of 123d street and Park avenue, 35 feet by 100 feet and 11 inches; the building is 35 by about 89 or 90 feet, 5 story and basement, red brick, ten apartments, nine of them have eight rooms and bath, one seven rooms and bath, steam heat, hot water, all modern improvements. It is a double flat, and was built, I think, in 1882. The entrance is on 123d street. The building faces south. There are 50 windows on Park avenue—24 on 123d street and 20 in the back of the building. The premises are in very good order, and have been kept in good order since Mrs. Birrell purchased them. They were in very fair repair when she bought them.

I made up the rent statements which have been put in evidence here, and they correctly state the rents of these different flats at those times. In the last rent statement put in evidence the letter V refers to vacancies, and the totals represent the actual rent received for the year, counting the vacancies. This building has in no way changed substantially since I purchased it. There have been no extensions or alterations made to it of any substantial character; it has been kept in good repair. At the present time I oc-

cupy the ground floor to the west, eight rooms and bath, and I have included that in my rent statement at $25.

Q. Is that a fair rent for it?

A. That is all I can get; I doubt if I can get that for it. I have been trying to rent it for the past four years. That is in the same proportion as the other flats. It used to rent very much higher at one time.

Q. Describe to the court the character of the structure on which the railroad was operated in front of your premises in 1892 just before you purchased them?

43 A. At that time it was running in a depressed cut about 18 or 20 feet deep, and at the corner of 123d street and Park avenue there was a bridge the full width of the street with 6 or 8 gas lamps on it, lighted at night-time, and the sidewalk on each side of this bridge was partitioned off, and the centre part of the street was occupied by this cut, which had a stone coping and an iron railing on it.

This cut was open at the top. I do not know how far down the avenue that cut began, but I should say just south of 116th street. To the best of my recollection that is where the trains entered the cut. I think it extended up to about 128th or 129th street. I used to pass there twice every day when I lived upon the Harlem road before I bought the property for Mrs. Birrell; I used to be up and down the road twice every day. The bridge that I spoke of was the full width of 123d street. It crossed Park avenue from our corner to the opposite corner. The tunnel ran in the centre of the avenue about 40 or 50 or 60 feet wide; then the streets were graded across this the full width of the street at 124th street, 125th and 123d street.

Q. How high was the top of the cut or opening with reference to the trains passing through?

A. If you were standing on the sidewalk at the corner you could see the smokestack of the locomotive just as it was passing; I don't think you could see the tops of the cars; I never remember seeing the tops of the cars; I noticed the top of the smokestack; this bridge rounded up just a little bit, high enough to let the trains pass under it. The cars did not reach to the top of the cut. There were four tracks in the cut and I should say it was about 50 feet wide, perhaps it might have been 60 feet. I never measured it. There was a change made, I think in 1894 or 1893.

They were building in the cut in 1893 and 1894 they com-
44 menced this wooden trestlework over this cut; stringers were put across, and uprights and pieces on the top on which to rest the rails for that temporary structure until they built this iron structure that they are running the trains on at the present time. First they built a wooden temporary trestlework structure. They ran trains on the temporary wooden trestle after they got it up; they had to move their trains above before they could build the piers in the centre of the cut on which to carry this iron structure,

I should say this trestlework was used a year or two, and in the meantime they were building the present structure.

It is admitted that trains began to be operated on the permanent structure February 16, 1897.

It is also admitted that the work of putting in the timber trestles, which was the first work relative to this change, was begun in May, 1894.

The present structure is an iron structure about 20 or 22 feet high, carries four tracks; I think it is 57 or 58 feet wide at our corner, and at the end of the building about 75 feet wide; I can tell you by looking at a memorandum I have (looking at memorandum).

In answer to DEFENDANTS' COUNSEL:

My son and myself made this measurement.

In answer to PLAINTIFF'S COUNSEL:

Q. Now state it?

A. It is 60 feet 10¼ inches, the width of the structure, outside measurement, at the corner of 123d street, and 75 feet 3½ inches at 100 feet 11 inches from the corner of 123d street, the end of our lot—that is the width of the structure there.

The structure widens as it goes north. It is about 22 feet
45 high, I think, and is supported by iron columns.

Q. Are there any of those columns in front of your premises?

A. Right at the corner there is a column, about half way down there is another, a little further down there is another one, there are three running across the street, but those are the ones facing my building; there is one about opposite the dining room, and the other one is just at the division line between our property and the property on 124th street in the rear. There are three similar columns at the other side of the structure; there are three on the east side of the street and three on the west side, opposite one another, and there are three in the centre. That makes nine columns in all in the street in front of my premises. I should say these columns are about 24 inches square. The base is much larger than that. The structure which is supported by these columns is built of iron or steel, and the railroad is operated there with four tracks; two centre tracks for express trains, the two outside tracks for local trains; the two tracks on our side are for the south-bound trains, and the two tracks on the other side are for the north-bound trains. The nearest station is between 125th and 126 streets.

Q. About how many trains pass the plaintiff's premises a day?

Objected to by defendants' counsel as incompetent, immaterial and irrelevant, and also on the ground that the plaintiff has already

shown by the documents put in evidence that the defendants have the right to operate their trains upon this structure.

Objection overruled. Exception to defendants.

A. I should say there were from 480 to 500 trains a day. I kept a count of it for some time.

46 Q. State what effects you have noticed from the operation of the trains on this structure, commencing with the effects of the operations of the trains originally there, before the change was made, and coming down to the present time?

Objected to by defendants' counsel as incompetent, irrelevant and immaterial, and too general in form, the question going to the operation of the trains on the four tracks.

Objection overruled. Exception to defendants.

A. During the time the wooden temporary structure was up there the noise was very great, so great that I lost a great many tenants through it, and the rents had to be reduced to keep what few tenants we had left; later on when they commenced to put up this iron structure they worked at that night and day, used electric lights there, and the hammering of iron made it like a boiler factory, something of that sort; people could not sleep, and there were complaints going on all the time about it—there was a reduction of rent all through the house to keep the tenants in.

Q. Come to the time when the operation of the present structure commenced and state — the effects of the operation of the trains on the present structure have been, what you have noticed in regard to noise, cinders and things of that sort?

Same objection, ruling and exception.

A. Since February, 1897, they have been running their trains on this iron structure, and we have noticed a great deal of noise, lots of smoke, quantities of cinders and dust in all the flats. I have seen the cinders fall and collected any quantity of them, and could collect a pailful at any time on the roof of the house, which is five stories high. I have had those cinders swept off or removed

47 from time to time. The inside of the area way I have swept every morning unless it happens to be a wet morning or Sunday morning, but it is swept nearly every morning; the window sills of the vacant flats are dusted off every morning. The next train that goes down will deposit a certain amount of them, and as the trains keep going the cinders keep collecting. If the window is open they come into the flat; I have picked them up in our own flat, and I have picked them up in the vacant flats. I have collected cinders and have brought them to court.

In answer to DEFENDANTS' COUNSEL:

I collected those cinders myself, and I saw the trains from which they dropped; they were on the tracks nearest the house and the ones next to it. I cannot tell the difference between those cinders

that dropped from the inside track and those from the outside track They are all alike.

In answer to PLAINTIFF'S COUNSEL:

Q. This white box containing cinders that you have produced, when were they collected?

A. They were collected on the 22d and 24th of April, 1900. The cinders in the dark box were collected on the 2d, 3d and 4th of May, 1900.

Plaintiff's counsel offered in evidence boxes of cinders.

Objected to by defendants' counsel as incompetent, irrelevant and immaterial, and on the ground he cannot identify the cinders which came from the trains running on the outside tracks and those on the inside tracks.

In answer to the COURT:

There was no other engines passing there except the engines of the New York Central and the New York and New Haven;
48 none others excepts those ran on those tracks. There was no fire around there of any building.

In answer to PLAINTIFF'S COUNSEL:

Some of these cinders are the size of a small hickory nut.

Boxes of cinders received in evidence and marked "Plaintiff's Exhibits R and S."

Exception to defendants.

The cinders now shown me were collected on the 25th of August, 1898.

Plaintiff's counsel offered box of cinders in evidence.

Same objection, ruling and exception.

Received and marked "Plaintiff's Exhibit T."

I have here five other boxes of cinders which were collected just about the same time as the last box, before the other trial, in 1898. I was a witness on the former trial of this action, and produced some of these cinders at that time, and they have been preserved since, including those I have collected myself this last month for this trial.

Q. Have you noticed anything in connection with the operation of trains at the station at 125th street so far as it affects your premises.

A. They stop all the express trains at that station but one or two, where formerly it was only local trains that stopped, and the starting of those trains jars our building very much indeed, as well as the depositing of those cinders, the smoke, making a great deal of noise, because those are heavy trains, eight, ten or twelve cars, heavy Wagner and Pullman cars. I refer now to trains being started from 125th Street station.

They come in there from the North and go to 42d street.
49 Of course the length of those trains puts the locomotives opposite our property in about the middle of the building, sometimes farther on, and after those trains arrive there and stop they don't seem to have steam enough to start immediately, and they are pounding away for some time to get that up, and that makes a great noise there and disturbs people. There is frequently a sort of process of firing up at 125th street, on the south bound trains especially; the trains going up do not fire up so much.

Q. With reference to the noise, state what effect you notice from the noise of passing trains, with reference to conversation, for instance?

Same objection, ruling and exception.

A. When holding a conversation with anybody in the dining-room or in the front room you have got to stop when those heavy trains pass; you can't hear one another speak. In 1892 and prior thereto, before the change was made, they did not stop express trains in 125th street—not as many—and of course there was not that noise opposite the building; there were only local trains that stopped at 125th street. As I noticed it at that time, it was not near so bad as it is at the present time; we did not get the smoke or the dust or the cinders. We could hear a rumbling, as if it was a wagon or something going past the place; that was all. We did not feel this jar or hear the noise that you do from this structure; we got very little smoke—none that I could remember of—and no cinders at all.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I think Mrs. Birrell bought this house in August, 1893, and the amount paid was $65,000, cash and trade. It was a farm in Mount Kisco, at about $27,000 or $25,000, and $2,500 in cash.
50 There were mortgages on this property at the time I bought it—a $32,500 mortgage to the Emigrant Industrial savings bank and $5,000 to the Coffin estate. There have been mortgages placed on it since. The $5,000 mortgage was paid off, and there was one for $2,700, I think it was, put on by Mrs. Birrell and myself; that was partly paid off, and there was one for $4,000 put on. Altogether $36,500 in mortgages on the property at the present time; $65,000 was the consideration money at the time of the purchase. The farm, I think, was put in at $25,000 or $27,000 and $2,500 in cash; there was a mortgage on that farm of $5,000; that was the furniture, implements and everything else on the farm. I commenced to live there June 30th, 1896. Prior to that time I had not been living on Park avenue, but had simply been there, going to and from this property.

I had been up there very frequently for a year. They were building previous to the time I went there to live. I used to pass through

there twice every day, when I came from Mount Kisco to New York. That was not all the opportunity I had of noticing the property; I used to get off at this property occasionally, and some time was there for an hour or two. That is all.

There was a bridge at 123d street when I bought the property, and you could not get across the avenue except by the bridges at 123d and 124th streets. The bridge at 123d street was the full width of the street; now the street is open all the way across, and paved in a way—very rocky pavement, I must say. The temporary wooden structure was put up there, and then the iron structure was put up over it, but I cannot tell whether trains ran on the wooden structure or not. When I made these measurements I have spoken about as to the permanent structure, my son and I made them from
51 the bottom of the structure; my son climbed up the column and held the tape, while I carried it across to the other side. We measured from the centre column to the other column—from the top to the bottom. My son is an assistant engineer, and knew pretty near what to do. I never measured the old cut. I know this permanent structure is outside of the lines of the old cut. Part of it, I know, is opposite our dining-room; the column that supports the structure opposite our dining-room was put there before the structure was built, and it is several feet this side of the cut; I could not say how many feet without measuring the thing.

The cinders in this black box are not all the cinders that fell during the three days I was collecting them; those are only the large ones. I could have collected pails full; I just selected a few samples. Some of them came out of New York Central trains and some out of the New York and New Haven; a great many came out of some of your big locomotives, some of them running on the local track and some on the express track. I could not tell the difference between cinders that fell from one engine and those that fell from another; I could not pick them out. I have seen firemen firing up a southbound train on leaving 125th street frequently; I saw it last night, firing up on a New York and New Haven train. I have seen firing up on a New York Central train; I saw it on the 30th of March, 1900, at 6 p. m., locomotive 820. They fired it up opposite this house, going through. That was on the outer track, an express train, the farthest east track—an express train on the local track.

During the time I was there I never got any cinders or smoke from the trains running in the old cut. You could see the smoke stacks as they passed along in the cut when you were standing on
52 the sidewalk. They threw out smoke but it did not come out that way and up the side of the building; before you had this structure built over the cut the cinders would strike and fall back into the cut during the time you are speaking of, and after I bought this property. There was a very low wall alongside that old structure, it might have been three feet high. Standing on the sidewalk you could see the smoke stack; the smoke stack was not over that wall, you could see the smoke stack of the locomotive as it passed

through the tunnel. Before the temporary wooden structure was put there I never had any complaint from the tenants about smoke or cinders coming into the building.

Re-direct examination—In answer to PLAINTIFF'S COUNSEL:

Q. As to the effects on the light by the passing trains; was there any effect on the light from that?

Same objection, ruling and exception.

A. Yes a great effect; if a train was passing when you were reading in the apartment, our apartment, or the apartment above, or the third apartment, when a train would pass on the local track you would have to stop reading, it darkens the place—in the day time it throws a shadow over what you are reading. It produces alternative flashes.

The local track I refer to, is the downtown track on the east side, the furthest easterly track.

In answer to DEFENDANTS' COUNSEL:

When a train is running on the centre southbound track the effect as to light is not as great as it is on the local track. It is farther away.

53 EDWARD H. PECK, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

My business is that of real estate agent. I know the particular boundaries of the premises in 123d street and Fourth avenue; I had charge of those premises from September, 1893 to July, 1896, as agent. During that period the premises were in fair condition, and we kept them in order.

NAPHTALI A. MILLHAUSER, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live at 101 East 123d street, in Mrs. Birrell's house. I have lived there close on to four years, occupying the second floor east, one flight up.

Q. State what effects of the operation of the railroad in front of these premises you have noticed as to smoke, cinders, dust, smell, noise, etc.

Same objection by defendants' counsel as made to the same question put to Mr. Birrell.

Objection overruled. Exception to defendants.

A. The interior of our apartment was in very good condition; the front room that I occupy as a sleeping room alongside of the parlor has been so jarred that the plaster has fallen down, and there are openings there from the jar of the trains.

Defendants' counsel moved to strike out that part as to jarring and vibration, on the ground that it is not part of the issues of this action.

Motion denied. Exception to defendants.

WITNESS: As to noise, it is simply awful, because trains
54 composed of eight, ten or twelve cars, sometimes more, stopping as they do principally in front of this property on the Fourth Avenue side from a point at 123d street back to the rear, are very heavy, and the locomotives have great trouble in starting, it is so bad you can't continue conversation, you must stop. There are any quantities of cinders, and the smell from the gas and smoke of course is worse than it ever was.

The light from the passing trains can hardly affect me because I am on the east, on the inside, I am not on the outer side. My windows face 123d street to the front, and the rear, there is a little alley way, a court, to one side of the property.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I mean to say that the noise is as great now as it was a year ago; I have noticed it particularly. I won't say the smoke is greater. I don't think it is any greater, but they seem to fire up, or whatever they do, they throw out an awful lot of smoke when they start from the corner, and put on a lot of coal, a fresh lot of coal. I get smoke in my flat, in both front and rear windows and sometimes in that little court around the corner. I have lived there close on to four years, but I don't know as that structure has been there all that time, I believe the temporary structure was there some little time—I don't think the road was operated on it when I first came there. When I first came there the road was operated in the cut. I have noticed a train running in the cut. I was then living in this house and previous to that a little farther down in the same street. When I was living in this house I never got any smoke and cinders when these trains were running in the cut.

55 ISABEL MCMARTIN, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I do not reside in Mrs. Birrell's house at present, but I formerly lived there, leaving there last October. I was formerly Miss Leaman. I think I first went to live in Mrs. Birrell's house in March, 1894; I occupied the second floor west.

Q. Did you notice any of the effects of the operation of the road while you were there, and if so, state what you observed?

Same objection by defendants' counsel.
Same ruling and exception.

A. The noise was very great, there were lots of cinders that used to come into the rooms; if the windows were open lots of smoke, disagreeable odors, and two ceilings fell while we lived there; also when the wash was hung out on the line and the fire-escape it turned the clothes all black. The noise I spoke of is the noise of passing trains. I noticed the vibration. In regard to the effect on the light by passing trains, if you were reading you would have to stop, because it would be darker, and it flickered so you could not see well. I lived on this avenue when the trains used to run in this cut, before they made the change. I don't think there was quite as much noise then, and there was not as many cinders, and not so much smoke, and, naturally, there was not the same effect on the light. The trains did not pass in sight of the premises. When trains passed there during the night we were disturbed, and the noise was certainly loud enough to interfere with sleep.

Q. I mean when you lived there until last fall?

A. Oh, yes; we noticed it just the same.

Q. Was the noise, when the trains were operated in the cut,
56 sufficiently great then to interfere with conversation or sleep?

A. Not so much; it would interfere somewhat, but after the trains went above you had to discontinue conversation, you could not hear what was said until the train went by. I mean after the trains were elevated on this viaduct. When they passed through the cut you would not have to dispense with conversation altogether, although it would interfere somewhat.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I was married last October, and I moved away from this house at the time I was married.

MARY J. FEGAN, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live at 31 West 16th street. I formerly lived in Mrs. Birrell's house.

My occupation is that of public-school teacher. I have been a teacher 18 years, in the city of New York. I think we went to Mrs. Birrell's house first, in the fall of 1894, and we left there in the fall of 1898. I remember when the railroad used to run in the cut, before they put it on the viaduct, and I remember how the trains used to be operated on the avenue then and the effects. I

have also noticed the effects of the operation of the railroad on the viaduct iron structure at the present time.

Q. State what you noticed about the operation of the railroad when you were living in Mrs. Birrell's house in 1898, on the present structure.

Same objection by defendants' counsel.

Objection overruled. Exception to defendants.

57 A. The noise was very loud. That was from the passing trains, and smoke and cinders annoyed us more; we were on the next to the top floor on the west side. We had several windows on Fourth avenue and the coal gas was very annoying. We got a great deal of that.

There was a smell; it had the effect of causing us to commence coughing. It was very disagreeable, and a great deal of the dust and cinders entered our windows; we could not put the bedding on the window sills at all without their becoming coated in no time with cinders and dust. We also noticed a great vibration in that building, and three of our ceilings fell during the time we occupied the flat, and one of the ceilings fell during the passage of a train. I remember that distinctly. I did not notice particularly the effect on the light by a passing train when I was sitting at the window; I think we were above the structure somewhat.

When the railroad was operated in the cut there was some noise, but I don't remember the smoke or gas or cinders annoyed us at that time. When the trains were operated in the cut the noise was not at all as great, not as it affected us in the least. I don't remember as there was any vibration at that time, I never noticed any. I occupied the fourth flat west and paid $30 when we left and $35 when we took the flat. We noticed a slight crack in a window pane after cinders struck it. Some of the cinders were remarkably large.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I live now in 16th street, but I did not move directly there from Mrs. Birrell's property; I used to live at 1900 Lexington avenue, and from there I moved to 16th street, where I live now.

58 There was considerable noise from the trains that passed on this structure when I lived there. I don't know whether there was more noise from the trains that ran on the tracks farther east or the track next to it. There were often several trains passing at once.

HENRY FISCHER, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mr. Birrell's house at the corner of 123d street and Park avenue, occupying the third floor inside—easterly side. I have occupied that flat about four years, I guess. It is more than four years since I went there, but I lived on the ground floor; it is about six years since I went into the building. I was there when the road was being operated in the cut.

Q. What have you noticed, with regard to the effect of the operation of the trains on the present structure, as to smoke, dust, cinders, noise and so on?

Same objection by defendants' counsel.
Objection overruled. Exception to defendants.

A. I have noticed since the tracks have been elevated that there is considerable more noise, and also we are troubled a good deal more with cinders than we were before the tracks were elevated, that is when they were depressed. At the present time, as the engines stop just about the end of the building and there is considerable more noise by letting off steam from the engines. I get some smoke, but there was not as much smoke when the trains were operated in the cut as at the present time. There is considerable more
59 noise since the present operation of trains than when they were operated in the cut. I noticed when the tracks were depressed that the noise then was less than at the present time.

Q. Have you noticed any vibration since the structure was elevated?

Objected to by defendants' counsel as not within the issues.
Objection overruled. Exception to defendants.

A. I have not.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I have noticed as much noise within the last year as I did before.

NORA REILLY, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I live in Mrs. Birrell's house, and have lived there since last August. I live on the top floor, west side, and I have noticed the operation of the trains going by. I am a little above the top of the trains as they go by.

Q. What have you noticed about the operation of trains?

Same objection by defendants' counsel.
Objection overruled. Exception to defendants.

A. I notice a noise very much, and foul air sometimes, and cinders, considerable cinders, sometimes worse than others; I do not notice any vibration, shaking, so much. I noticed the interference with the light; sometimes the smoke from the engine makes it.

60 Cross-examination—In answer to DEFENDANTS' COUNSEL:

I am on the top floor and I should say the trains run just about on a level with the floor under me.

This structure does not interfere with the light in my room; only when the smoke comes we notice the smoke occasionally, that is all.

FRANK G. SWARTWOUT, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to PLAINTIFF'S COUNSEL:

I am a real estate broker and appraiser, and my office is in the Mt. Morris Bank building, corner of 125th street and Park avenue, in the borough of Manhattan, New York city. I have been in business as a real estate dealer in the city of New York, borough of Manhattan, over twenty years. During that time my operations have principally been in the upper part of New York city. I know the plaintiff's premises, 123d street and Park avenue, and have known them from the time they were built, which is about twenty years, I think. I have been familiar with the neighborhood during the time I have been in business and have bought and sold real estate in that neighborhood during that time. I have also attended to the letting of premises in that neighborhood during that time, and have appraised property extensively. I have conducted building operations myself within the last two years to the extent of several million dollars. I have the full numbers of the Real Estate Record and Guide from the first one that was ever published down to to-day, and I have been in the habit of consulting it frequently in the course of my business, in order to make myself familiar with what has been done in that business. I have attended

61 a great many auction sales of real estate, and have made it my business to keep myself informed of the fee and rental values in the city of New York, and especially in this neighborhood where the plaintiff's property is.

I have examined the plaintiff's property, with a view of testifying as an expert in this case. The last time I examined them was this morning, but I have examined them several times before. I was a witness on the former trial, a little over a year ago, and I examined them at that time and have since then. The premises consist of a five-story brick and stone apartment house, located on the northeasterly corner of 123d street and Park avenue, being a double flat with all the modern improvements—steam heat, hot water supply; the entrance is on 123d street. The improvements are bath-rooms,

hot and cold water, closet, steam heat, hot water supply—all the modern improvements. The premises are in fairly good repair, with the exception of cracks in the walls and chimneys and other parts of the premises. Standing on the roof, I could see the chimney shake when a train went by; that probably was the cause of the cracks.

I have noticed the vibration and the effect of the vibration upon the chimney and other parts of the building. As I stood on the roof the chimneys as the trains go by would shake, and you could feel the vibration under your feet standing on the roof, also in the house. In different parts of the premises, when large trains went by, I could feel the vibration.

In my opinion the value of these premises at the present time is about $36,000, house and land, $19,000 for the land and $17,000 for the building. The fee value of the same premises in 1892, before the change in the operation of the railroad, was $60,000,
62 $28,000 for the building and $32,000 for the land; in 1894 the value was $54,500, $25,500 for the land and $29,000 for the building. In February, 1897, the value was $38,000, $21,000 for the land and $17,000 for the building. In 1892 the rental value of the premises was about $4,500, in 1894 about $4,000, in 1897 about $3,400, and at the present time $3,300 to $3,400.

Comparing the course of valuation on Park avenue with Lexington and Madison avenues before 1892, there was very little difference in the course of values between these three avenues. If anything, Park avenue was better than the other avenues, built up more and it was more of a business avenue. The course of values on these three avenues for the ten years prior to 1892 had been upward to a certain extent. Up to that time Park avenue was always a little ahead of the other two avenues. Madison was the first avenue parallel to Park avenue on the west, and Lexington avenue is the first avenue parallel to Park avenue on the east. From 1892 to the present time the course of values on Park avenue between 116th street and the Harlem river had been downward, about 25 to 50 per cent. The course of values upon Lexington avenue between 116th street and the Harlem river from 1892 to the present time has been upward about 25 to 50 per cent. The course of values on Madison avenue during the same period or some part of it has been about the same as Lexington avenue, that is upward from 25 to 50 per cent. The course of values on the side streets from 116th street upward, say between Lexington and Madison avenues, has been upward to within about 300 feet of Park avenue. Within 300 feet of Park avenue it has been downward about 10 or 15 per cent. The course of values on the other parts of the side streets not within
63 300 feet, but further west and east respectively in that neighborhood, has been upward about 10 or 15 per cent.

Q. Has there been any existing fact which caused any difference in the course of value in those side streets between that part of the side streets within 300 feet of Park avenue and the remainder?

A. Yes, the construction of the railroad on Park avenue, the noise.

The operation of the road has made it very difficult to rent or sell property near the avenue. It has been difficult to rent or sell property on Park avenue for the last eight years. Prior to that time it was not.

I remember the building of the viaduct on Park avenue when it began and the course of building at that time. I saw it every day. I was familiar with what was done there and the effect of that upon the rents and values on that avenue.

Q. State what was done during that period in the construction of the road, how it began and what went on at this point.

A. First, they tore down the sections of the parapet wall above the street and made their excavations for their piers; next they put up wooden trusses to support the iron trusses; next they erected the iron structure which is now there. I am now testifying to what the defendants did at this point in the avenue. I think the work continued there about five years. The whole avenue was occupied, some parts of it was entirely blockaded. At this point near the plaintiff's premises there were a great many workmen engaged. There was little or no traffic on the street during the construction there. The effect of the carrying on of the work at that time was that you could not rent property; nobody wanted it.

Q. After this work was discontinued and the present structure was erected, what was the effect on rents then of that change, the discontinuance of that work and the operation of the present structure?

64

A. It was not any better.

The course of rental val-es on Park avenue since 1892, from 116th street to the Harlem river, has been downward, and on Madison and Lexington avenues during the same period the course of rental values has been upwards 5 to 10 per cent. The decrease in Park avenue has been from 25 to 50 per cent. On the cross streets the course of rental values 300 feet from Park avenue and going west and east as far as Madison and Lexington avenues, has, in some cases, increased and in some cases remained stationary. The increase has been 5 to 10 per cent.

Cross-examination—In answer to DEFENDANTS' COUNSEL:

I have not sold any property on Park avenue in the last eight years. Within the last eight years I have rented at 125th street and Park avenue, 126th street and Park avenue, 129th street, 120th street and 121st street and Park avenue. I rented at 126th street and Park avenue about two years ago. I am renting 129th street and Park avenue at the present time.

I gave the present value of this property at $36,000. I think it has depreciated about $1,000 in the last year. I testified on the former trial of this action.

Q. On the former trial was this question asked you, "What, in your opinion, is the fee value of these premises at the present time," and did you answer, "$38,000"?

A. I believe I did.

Q. Have you changed your opinion?

A. At that time, no, sir; I answered the same to-day, $38,000 in 1897.

There is a difference between $36,000 and $38,000 of
65 more than $1,000, but the premises are worth less to-day than they were at that time, the difference between 1897 and 1900. I don't remember the date of the former trial; it was a year or two ago. Property is on the decrease all the time in that vicinity. The value of a corner lot in that vicinity to-day is about $10,000 or $11,000. I say the value of this lot on which this building is situated to-day is about $19,000. The size of the lot is 35 by 100. The size of an ordinary lot is 25 by 100. I said the property on the side streets had decreased to within 300 feet of Park avenue.

Q. On the former trial of this case you were asked this question, "What has been the course of values on side streets in Harlem between 116th and 121st street and between Park and Lexington avenues from 1892 to the present time—fee values?" And did you answer, "They have increased up to within 200 feet of Park avenue." Have you changed your mind?

A. Within 200 or 300 feet.

Q. You answered 300 feet. Do you wish to change your answer?

A. No. To-day I believe it is 300 feet—from the experience I have had the last year, I can increase it. It has changed within the last year.

I know the property at 103, 105 and 107 East 123d street. They are adjoining this property in suit. I do not know what they rent for. I know there have been some sales of this property, but I have forgotten what they were. These houses are not exactly the same as this property of Mrs. Birrell. Those are inside houses, and this is a corner house. The difference is Mrs. Birrill's has a steam-apparatus and steam-heating plant, which did supply all the other houses, and in that way it was constructed somewhat different. They
66 have the same number of rooms, except one apartment in Mrs. Birrill's.

Q. On account of the vestibule?

A. I don't remember what the cause of it was, but there is some little difference.

I know the property at the southwest corner of 124th street and Lexington avenue well. It is a five-story apartment house and stores. That property has not been recently sold. I have had charge of that property ever since I sold the land and building. The flats in that building to-day rent for $35, $28 and $40, and they rented for the same five years ago. There has been no change in the rent, except the stores. I do not know that there has been any depreciation in the value of that property. My books will show the

rents right along from year to year, and it shows an increase in the stores. About five years ago the corner store rented for $1,200, to-day it is $1,500, and is occupied by Hendrickson, the druggist. I think he has been there about five years.

I know the property at the southwest corner of 129th street and Lexington avenue by passing by. It is a five-story apartment house and stores. I had it for sale two or three years ago for about $80,000, but I did not sell it. I know nothing about the rents of that property; don't know whether they have appreciated or depreciated.

I know the property at the northeast corner of 121st street and Lexington avenue by passing it. It is a five-story apartment house and stores, but I do not know whether there have been any sales of that property recently, nor do I know the rental value of the property.

I know the property at the northeast corner of 123d street and Lexington avenue. That is a five-story apartment house and stores.

I do not think any sales of that property have been made re-
67 cently, not within the last seven or eight or ten years. I do not know what the rental value of those flats are. They have always rented well, but I do not know what they rent for.

I know the property at the northeast corner of 117th street and Lexington avenue. It is a five-story apartment house, but I do not know what the rental values are, nor whether they have appreciated or depreciated within the last five years. I know the property by passing it only. I had it for sale from the man that built it at the time, but I did not sell it.

I know the property at the northeast corner of 124th street and Madison avenue, but I do not know anything about the rental value of that property to-day.

The value of this property in suit in February, 1897, was $38,000, and I think it depreciated between February, 1897, and January, 1899. I don't remember that I said on the beginning of the cross-examination that this property was worth $38,000 in January, 1899. I say it was worth about $37,000; I consider it depreciates about $1,000 per year.

Re-direct examination—In answer to PLAINTIFF'S COUNSEL:

The rental value of the apartment occupied by Mr. Birrell is about $25 per month.

Plaintiff rests.

Defendants' counsel moved to dismiss the complaint on the following grounds:

I. That the plaintiff has failed to show that under the street opening proceedings commenced in 1850 and consummated in 1853
under the acts of the legislature, and subject to the municipal
68 ordinances, resolutions and agreements then in force in respect to this avenue, any easements or property rights appur-

tenant to the premises described in the complaint have been taken, abridged or interfered with by the direction or maintenance of the structure complained of, and the operation of trains thereon.

II. That the plaintiff has failed to show any substantial pecuniary damage to the fee or rental value of the premises described in the complaint arising from the acts of the defendants, or either of them.

III. That the plaintiff has failed to show any injury to the fee or rental value of the premises described in the complaint by reason of so much of the viaduct structure as lies outside of the strip of land along the centre of Park avenue, about 60 feet in width, devoted exclusively by chapter 702 of the Laws of 1872 and for more than 20 years prior to the commencement of this action, to and used under said act exclusively for railroad purposes.

IV. That the plaintiff has failed to show any injury to the fee or rental value of the premises described in the complaint by reason of so much of the viaduct structure as lies outside the strip of land, 24 feet in width along the centre of Park avenue occupied by the defendant, The New York and Harlem Railroad Company, by condemnation proceedings taken pursuant to chapter 263 of the Laws of 1871 against Samson Adolphus Benson, and thereafter for more than 20 years prior to the commencement of this action used exclusively for railroad purposes.

69 V. That the only damage to the premises in suit, if any, shown is inconvenience to the occupants thereof, and resulted from the acts of the board for the Park Avenue improvement above 106th street, for which neither of the defendants is liable.

VI. That any additional interference with the light and air of plaintiff's premises caused by the elevation of the tracks over which the defendants' trains are operated is offset by additional facilities of access to said premises resulting from the completion of the improvement and the throwing open of Park avenue from curb to curb as a public street.

VII. That any loss, if any, in the rental value of the plaintiff's premises has been offset by the benefit to the premises for business purposes arising from the completion of the Park Avenue improvement and the opening of a new station at 125th street.

VIII. That neither of the defendants is liable for any damage caused by the operation of their trains pursuant to legislative mandate upon the structure provided by the legislature of the State of New York and the municipality of the city of New York.

IX. That the only damage, if any, to the fee or rental value of plaintiff's premises from the operation of trains on the new structure is by reason of the additional noise over and above the noise formerly arising from any operation of trains in the cut is caused solely by the new structure designed by the State and municipality of New York.

X. That the only damage, if any, shown as likely to result
70 to the fee or rental value of the plaintiff's premises from the future maintenance of the viaduct structure complained of,

and the operation of trains thereon, is the noise which will arise only from the lawful running and operation of the defendants' trains, for which the plaintiff can have no recovery.

XI. That the plaintiff has an adequate remedy at law for any relief to which she is legally entitled.

XII. That the plaintiff has failed to prove any substantial impairment of the easements of light, air and access, or either thereof, or any damage to the premises caused by the maintenance and operation of defendants' road upon that part of the viaduct which extends beyond the centre 24-foot strip, apart from the operation of the road upon the centre twenty-four feet.

As to the defendant, The New York and Harlem Railroad Company, on the ground that no act of any kind has been shown to have been done by that defendant.

Motion denied; exception to each defendant on each ground.

It is stipulated that the work of constructing the elevated railroad on Park avenue was performed by the board for the Park Avenue improvement appointed pursuant to the statutes of 1892 and 1894, and in conformity with the terms of those statutes.

Defendants' counsel offered in evidence chapter 263 of the Laws of 1831.

Defendants' counsel offered in evidence final decree made by the court of chancery in condemnation proceedings instituted by the New York and Harlem Railroad Company to secure title to a
71 strip of land 24 feet in width along the centre line of Fourth avenue and opposite the premises in suit.

Received and marked "Defendants' Ex. 2." (Printed in appendix.)

Defendants' counsel offered in evidence map filed in the office of the register of the city and county of New York, October 22d, 1831, locating the route of the railroad of the New York and Harlem Railroad Company, with the resolution of the common council of New York on October 11th, 1831.

Received and marked "Defendants' Ex. 3." (Printed in appendix.)

Also ordinance approved by the mayor of New York, December 22d, 1831, and incorporated in the covenants of the New York and Harlem Railroad Company with the mayor, aldermen and commonalty of the city of New York, dated January 9th, 1832.

Received and marked "Defendants' Ex. 4." (Printed in appendix.)

Also the award of benefit and damage against premises abutting on the easterly side of Fourth avenue between 123d and 124th streets, including the premises described in the complaint, in proceedings taken by the mayor, aldermen and commonalty of the city of New York, to open Fourth avenue as a street 140 feet wide from 38th street northerly.

Received and marked "Defendants' Ex. No. 5." (Printed in appendix as Plaintiff's Exhibit H.)

Also chapter 702, Laws of 1872.
Also chapter 339, Laws of 1892.
Also chapter 548, Laws of 1894.
72 Also chapter 594, Laws of 1896.
Also chapter 143, Laws of 1848.
Also chapter 907 of the Acts of Congress of 1890.
Also chapter 613 of the Laws of 1898.
Also lease dated April 1st, 1873, made by the New York and Harlem Railroad Company to the New York Central and Hudson River Railroad Company for the term of 401 years.
Received and marked "Defendants' Ex. No. 12."
Also agreement made between the city of New York and the railroad company, dated January 9th, 1832.
Received and marked "Defendants' Ex. 13." (Printed in appendix.)
Also photograph of the premises in suit taken December 12th, 1898, at 11 o'clock a. m., looking northeast.
Received and marked "Defendants' Ex. 14."
Also photograph looking under the structure on Park avenue, looking south, taken October 13th, 1898, showing the premises in suit.
Received and marked "Defendants' Ex. 15."

CHARLES H. CHAMBERS, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at White Plains, New York. I am assistant auditor of the New York Central and Hudson River Railroad Company, and as such assistant auditor I have charge of the disbursements made on account of the Park Avenue improvement. I have not in
73 my charge the documents showing the expenditures made under the improvement of 1872. The papers showing the expenditures made on Park avenue under the laws of 1872 are in the treasurer's department. I have a memorandum here of the amount that the improvement of 1872 cost; it was $6,482,576.86. The present improvement under the laws of 1892 cost to March 1st of the present year, $3,893,930.22; that takes the entire structure from 106th street to 149th street. Part of that was north of the Harlem river, and north of the Harlem river the railroad company paid all the expenditures, but south of the Harlem river it did not. The proportion paid by the city was $773,531.95, and the balance was paid by the railroad company. I have the figures here of the amount the improvement cost south of the Harlem river to 149th street. It was $2,244,165.97. North of the Harlem river there are two items, the bridge and the viaduct structure; the bridge cost $812,031.91 and the viaduct north of the bridge to 149th street $269,622.64.

JOSEPH H. FRANKLIN, called as a witness for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 14 East 125th street. I am manager of the Grand Central station and of the Harlem line, and have been such manager since 1892. I have been employed on the New Haven road and the New York Central since 1851. I was familiar with the operations of the trains along Park avenue during that period to the present time. Prior to 1872 the trains operated in Park avenue at 123d street ran on the surface. About 1874 they went down into
74 the cut in front of 123d street. Now they run on the viaduct structure, on which there are four tracks; it is ballasted with stone ballast.

I am familiar with the number of trains run a day over that structure. The two easterly tracks are the south-bound tracks, the two westerly tracks are the north-bound tracks. We run most of the local trains on the two outside tracks; the trains that stop at 110th street, for instance, they have got to run on the outside tracks and the express trains run on the two centre tracks, and sometimes on the other tracks. I think about 75 per cent. of the express trains run on the two centre tracks. The local trains average about four cars. The express trains will average six or seven cars. The number of trains run over this structure a day, north and south, varies a little—there are about 475 to 480 a day; we call an engine a train, or anything that runs over the line. That includes everything that runs over the structure.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

I don't think the length of the cars will average 65 feet, they will average about 62½ feet—they run from 50 to 70 feet. I think the average weight of a locomotive on an express train would be about 90 tons, and on the local trains I don't think they will go over 70 tons.

This track was ballasted about a year ago; in 1899. Prior to 1872 the road ran along the surface from 42d street to across the Harlem river, all the way on the surface. In 1872 this cut was constructed. It began at 42th street and extended to the Harlem river, all the way in the cut. The depth of that cut at 123d street was about 15 feet. I do not know how many trains run on the outside
75 tracks, probably 35 to 40 per cent. Two tracks would not accommodate all of our traffic on the road there.

Re-direct examination—In answer to DEFENDANTS' COUNSEL:

There are about as many trains north-bound as south-bound. The locomotives running over the structure burn hard coal and some burn soft coal; the engines that burn soft coal are provided

with coke to burn to carry them out to the city limits. They do not burn soft coal on the structure, they burn coke. The firemen are prohibited from doing any firing on this structure, and we think they always obey. I have known of instances of men disobeying orders of that kind, but they got reprimanded very severely summarily. I keep a watch for that purpose to find out if they do.

EZRA P. NAYLOR, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at Yonkers and my business is that of civil engineer and railroad engineer. I am in the employ of the New York Central and Hudson River Railroad Company, and have been in their employment since 1887. From 1887 to 1892 I was in the employ of the New York Central Railroad Company, and from 1892 to 1898 in the employ of the board for the Park Avenue improvement.

I was familiar with the depressed cut in front of the premises at 123d street and Park avenue, and I am familiar with the structure as it is now. The depth of that old cut at this point was about 15 feet below the pavement on Park avenue, and there was a parapet wall there about 2 feet 6 inches high. The width of the de-
76 pressed cut at the bottom was 50 and at the top 52 feet. The present iron structure at this point varies in width, at the north line of this property it is 75 feet 3½ inches from out to out; at the south line it is 60 feet 10¾ inches from out to out. The height of the structure at this point is 14 feet 4¼ inches to the bottom of the girder, and the girder is 7 feet 4¼ inches deep. That would make a total of 21 feet 9 inches, and that is the height of the structure. That is not the height of the rail, it is the height of the top of the girder, the rail is 20 feet 5 and ¼ inches above the pavement. There are four tracks on this structure, and the whole structure is within the old 100-feet line of the avenue.

I am familiar with the original 24-foot strip acquired by the railroad company; the two centre tracks upon the viaduct structure are within the 24-foot strip.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

There are two outer tracks outside of that, both of them are entirely outside the 24-foot strip.

In answer to the COURT:

The centre strip is occupied by two tracks and the other two tracks are on the outer sides of that strip. Two of those tracks cover that strip, one is north-bound and the other is south-bound. There are two other tracks, one is on the east side of the strip, and the other is on the west side of the strip.

In answer to PLAINTIFF'S COUNSEL:

The two centre tracks are within the 24-foot strip and the outside tracks, each of them is outside of the 24-foot strip. The width of the structure at the southerly line of the plaintiff's premises
77 is 60 feet 10 and ¾ inches. There are 18 feet 5 and ⅜ inches of the structure east of the 24-foot strip at this point and the same westerly. The width of the structure at the northerly line of the plaintiff's premises is 75 feet 3½ inches, and there are 25 feet 7¾ inches east of the 24-foot strip and the same west.

Q. (Referring to diagram.) What is the distance between the easterly rail of the westerly south-bound tracks on the lines of the 24-foot strip?

A. The rail is about a foot and half inside of the 24-foot strip.

Q. What is the distance required for the safe operation of cars 70 feet long outside of the centre of the rail?

A. It don't make any difference about the length of the cars.

The width of an ordinary car is about nine feet. The cars hang over the rail about two feet. When a car is running on that southerly or westerly south-bound track, I think about six inches of it overhangs part of the street outside of the 24-feet strip.

Q. Then it is not possible to operate the two centre track of this railroad as they are at present constructed within the limits of the 24-foot strip.

Objected to by defendants' counsel as calling for a conclusion.

Objection overruled. Exception to defendants.

A. It is possible to operate the two tracks of the railroad within the 24-foot strip.

As the two centre tracks at the present day are operated they extend over the 24-foot strip about six inches on each side. The tracks are spaced more than the normal spacing.

The station at 125th street is under the tracks; the platform is between the tracks, the two easterly and westerly tracks. At no time was the platform outside of the tracks entirely; we never built the platform there in that way.

78 Q. Where do the tracks begin to spread to get on either side of the platform?

A. The two centre tracks run straight.

There is a curve in the two outer tracks; it is indicated on the drawing. With reference to the plaintiff's property, the curve of the two outer tracks begins at the north line of 123d street, and extends to about the south line of 124th street.

Q. What is the reason for that curve?

Objected to by defendants' counsel as incompetent, irrelevant and immaterial.

Objection overruled. Exception to defendants.

A. To spread the tracks so as so allow a space for the platform.

Q. The platform, as far as the two outer tracks are concerned, might have been placed outside the whole tracks, might it not?

Objected to by defendants' counsel as incompetent, irrelevant and immaterial.

By the COURT: Not what might have been done; we are talking about what was done. The map is in evidence, I suppose, and shows exactly the location of the station and the width of the structure.

DEFENDANTS' COUNSEL: This is a map entitled "Elevation east side." Section AA shows under the act of 1892, in dotted lines, the former depressed roadbed, and the present viaduct structure with relation to its distance from the east building line at Park avenue at 123d street, showing under the act of 1892 the south end of the platforms of the station at 125th street. We offer this map in evidence.

Received and marked "Defendants' Ex. 16." (Printed in appendix.)

A change has been made in the ballast of this structure
79 within the last year or two. The rails have been taken off of their bearings on the iron structure, and are now resting on wooden ties, with stone ballast underneath the ties. That work was done in the fall and winter of 1899. It commenced at the end of June, 1899, and was completed in January, 1900.

From my knowledge and experience as an engineer, I can say that the effect of that ballast upon the sound of trains going over the structure will be to very much lessen it.

WALTER KATTE, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 523 Madison avenue, and my occupation is that of civil engineer. I have been a civil engineer between forty and fifty years. I was chief engineer of the New York Central and Hudson River Railroad Company from 1885 to May, 1898. I was familiar with the act of Congress requiring the bridges over the Harlem river to be raised. As chief engineer of the New York Central and Hudson River Railroad Company I prepared a plan elevating the tracks of the New York Central to conform to the act of Congress. The elevation commenced at 125th street. That plan was not adopted. I did not make an amended plan until after the inauguration of the board of commissioners of the Park Avenue improvement. That was under the act of 1892, and I was one of the commissioners and superintending engineer. As superintending engineer I prepared the plan, in conformity with the act of chapter 339 of the Laws of 1892, I think it is, for the elevation of the tracks. The plan prepared by the commissioners was adopted. The first plan was the one
80 I spoke of as being in accordance with the act of Congress; that the commissioners had nothing at all to do with. The

commissioners' plan of 1892, prepared by me under their direction, was adopted.

Q. Was that plan amended?

A. That is the amended plan, between 111th and 115th streets, that was adopted; that is under another act.

The plan I prepared under the act of Congress was entirely sufficient for all railroad purposes.

Q. Why was that changed?

A. It can hardly be said to have been changed because it was never adopted for the reason that the act of the legislature passed authorizing it was never signed by the governor; the whole thing fell through—that is under that plan.

LORENZO S. PALMER, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to DEFENDANTS' COUNSEL:

I live at 35 West 132d street. My business is that of real estate broker and appraiser. My office is in the Twelfth Ward Bank building, 147 East 125th street. I have been a real estate broker and appraiser sixteen years, and during that period I have bought and sold property in Harlem. My business has been principally in Harlem, and I have appraised and rented property in Harlem, such as private houses, dwelling houses, apartment houses, and everything pertaining to real estate, both vacant and improved.

I am familiar with this property at the northeast corner of 123d street and Park avenue. I have examined it; the last time being last Sunday of this week. The present value of that property today is $40,683; $21,000 for the lot and $19,683 for the
81 building. In 1892 the property was worth $48,000; $21,000 for the lot and $27,000 for the building. In 1894 it was worth $45,300; $21,000 for the lot and $24,300 for the building. In the early part of 1897 it was worth about $40,683, about the same as it is today. There has been no change between that time and today. The value of a vacant lot 25 by 100 in that locality today is $18,000. As to a lot 35 x 100, it would be about $25,000. It makes a difference in the value of property in that locality if there is a building on it of this description.

I should say this building was built about 1883. Since that time a great many apartment houses of this description have been built in Harlem. This is not a strictly modern house.

I am familiar with the course of values of property both fee and rental on Madison avenue since 1892. The course of values of property of this character on Madison avenue since 1892, between 116th and 120th streets, has appreciated 15 to 20 per cent. North of 120th street it is about stationary.

I am familiar with the course of values in Lexington avenue in this locality within the last 8 years. The course of values there has

been about stationary. Lexington avenue was built up in 1892. I am familiar with the rental value of this property at 123d street and Park avenue today, and its rental value today is $3,870. That is between 9 and 10 per cent. on the valuation. The course of values on Park avenue within the last ten years has been stationary. The rental value has been a little lower, possibly a depreciation of 10 per cent.; the fee value has been stationary. The reasons why the rental value has been lower are that there has been a general depreciation throughout the city, what they call the commercial
82 panic of 1893, 1894 and 1895 had a tendency to depreciate rents all over. I doubt if a complete recovery has been made from that year, it is still feeling the effects of it.

In answer to the COURT:

Generally all over, not more particularly there—it is the same all over, and that effect has not been finally removed, I think.

Cross-examination—In answer to PLAINTIFF'S COUNSEL:

In computing the fee value of this property I took the rental value into consideration to some extent. I say the rental value today is $3,870. In computing the fee value I assume that to be the rental value, so my fee value is based on the rental value to some extent. That is an important factor in determining the value of property. Among the causes for the depreciation of rental values on Park avenue I do not necessarily take into consideration the operation of this railroad. I don't consider that the operation of this railroad with its attendant incidents of noise, smoke, dust and cinders, and so on, has any more effect on the rental value of the property than it ever had.

By the COURT:

Q. Has it any effect at all?
A. No, sir.

By the COURT:

Q. Do I understand you to say that the noise of a railroad running close up against a building occupied as a dwelling, and the escape of steam, gas and cinders does not affect the value of that property?

A. Most assuredly it does. But my reason for answering as I did is that this has always been a railroad, any houses that were built there were built under the conditions that existed at that
83 time, and exist to-day—the same conditions exist to-day that did then, therefore the course of rents would remain the same as they did ten years ago.

In answer to PLAINTIFF'S COUNSEL:

I say it does not affect the value of the property to have the operation of the railroad there any more than it did ten years ago.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Q. I ask you if the operation of this railroad, with the smoke, dust, cinders, and so on, as have been described, affects the value of the property?

A. It affects the sale of property there surely. It is not as salable as it would be if it were not there.

By the COURT:

Q. Do you mean to tell me if that railroad was not there that property would not be worth more than it is to-day?

A. Surely it would.

It affects it unfavorably, and makes it more difficult to rent property on the avenue to some extent, I guess.

In answer to DEFENDANTS' COUNSEL:

Those conditions have always obtained there.

Defendants' counsel moved to strike out the testimony of the witnesses Birrell, Peck, Milhauser, McMartin, Fegan, Fincke and Reilly as to the noise, and the smoke, cinders, gas emitted from trains operated upon the structure, on the ground that they have, in their evidence, made no differentiation between trains operated on the outside tracks and those operated on the inside tracks.

Motion denied. Exception to defendants.

Defendants' counsel renewed his motion to dismiss the complaint on all the grounds stated at the close of the plaintiff's case.

84 The exhibits herein not printed in this case on appeal may be produced and used by either party on the argument of any appeal herein with the same force and effect as if so printed. In the event of their non-production they shall be deemed to be sufficiently described in the record.

The foregoing case on appeal contains all the evidence, exceptions and proceedings taken and had upon the trial of the above action.

(Here follow maps marked pp. 85 and 86.)

87 DEFENDANTS' EXHIBIT 2.

Abstract of the papers filed in the proceeding instituted by the New York and Harlem Railroad Company to acquire lands of Samson Adolphus Benson, an infant, and others, introduced in evidence by plaintiff in the foregoing case upon appeal.

(1.) On the 6th day of April, 1832, the New York and Harlem Railroad Company filed its petition in the office of the vice-chancellor of the first circuit in the city of New York, verified the 3d day of April, 1832. The said petition recites the provisions of chapter 263 of the Laws of 1831, incorporating the New York and Harlem Railroad Company, and that the said railroad company, in pursuance of the provisions of said act had located the route of its railroad or way in the centre of the Fourth avenue from the Harlem river to the north side of 23d street, and duly filed the map thereof in the register's office of the city and county of New York, with approval of the same by joint resolution of the common council of the city of New York, together with the certificate of the directors under their hands and seals designating the line, course or way of said railroad. The petition then recites the provisions of the eighth and ninth sections of said act relating to the acquisition of such lands or real estate as may be indispensable for the construction or maintenance of a single or double track railroad or ways. The petition shows that since the approval by the common council of the
88 maps showing the route of said railroad, the mayor, aldermen and commonalty of the city of New York gave their consent and authority to the petitioners to construct their said railroad or way along the centre of Fourth avenue from the Harlem river to the north side of 23d street, and "that for the purpose of constructing their single or double railroad or ways, and in order to keep the line, course, road or way thereof, your petitioners were required to be seized and possessed of the fee simple of the following lands and real estate, namely: 1st. All that certain piece of land bounded westerly by a line drawn parallel to the westerly side of the Fourth avenue on the easterly side thereof at the distance of thirty-eight feet therefrom; easterly by a line drawn parallel to the westerly side of the Fourth avenue at the distance of sixty-two feet therefrom; northerly by an old road leading from Harlem to King's bridge; and southerly by lands of Peter Poillon, being about seven hundred and eighty feet in length on each side by about twenty-four feet wide. And your petitioners shew unto your honor that the fee of the said estate is in one Samson Adolphus Benson, an infant, under the age of fourteen years."

After describing other parcels of property acquired in said proceedings, but not material here, the petition states: "And your petitioners further shew unto your honor that they offered to purchase

the fee of the second (2nd) third (3rd) fourth (4th) and sixth (6th) described pieces of land and real estate of the several owners thereof; and they offered to purchase the fee of the piece of land and real estate firstly and fifthly described; but your petitioners and the owners and the guardians of the infant owners have disagreed as to price.

And your petitioners further shew that said offer and said
89 disagreement of price took place prior to the making of any map of the said road upon the said lands and real estate."

The prayer for relief asks that the court cause such notice to be given to the parties interested, etc., as shall be deemed proper and sufficient, and that upon the return of said notice the court direct the manner of ascertaining the damages which the several owners of the said lands and real estate will sustain by the occupation thereof by the petitioners, and further asks the court to appoint three competent and disinterested commissioners who will make appraisements and report their examination of the premises and their awards to the court which increase or diminish the damages awarded in case the court should be satisfied injustice has been done. The final portion of the prayer for relief is as follows:

"And your petitioners also pray that your honor will direct as to the several amounts of damages and make an order or decree (in due time) particularly describing the amounts and reciting each appraisement of damages and the mode of making the same and other facts necessary to a compliance with the eighth section of the said act, entitled An act to incorporate the New York and Harlem Railroad Company; and so that when the said order or decree shall be recorded in the office of the register of the city and county of New York your petitioners shall and may be seized and possessed of the fee simple of all such lands and real estate and may enter upon, take and use all the same for the purpose of said road; and for such further order in the premises as your honor may grant. And, &c."

90 Isaac Adriance appears as solicitor for the petitioners.

(2.) On the 6th day of April, 1832, an order was directed to be entered by William T. McCoun, Esq., vice-chancellor; said order is entitled "In the matter of the petition of the New York and Harlem Railroad Company in relation to certain lands required to be entered upon and taken possession of for the use of said company." Said order recites the petition filed by said petitioners, and directs that the time and place of hearing of the parties interested in the said petition shall be Tuesday, the 24th of April, 1832, and that fourteen days before said time of hearing a copy of this order and the petition shall be served upon Samson Adolphus Benson and others named in the petition as parties interested in the lands therein mentioned.

(3.) On the 27th day of April, 1832, a copy of said petition and of said order, together with the affidavit thereto attached of Pierre E. T. McDonald, to the effect that he served a copy of said original peti-

tion and order on Samson Adolphus Benson and others on the 7th day of April, 1832, was filed.

(4.) On the 27th day of April, 1832, an order was filed and entered upon the direction of William T. McCoun, Esq., vice-chancellor, reciting the original filing and the affidavit of service, &c., of said petition and order, and appointing John Leonard, Charles Oakley and John B. Thorpe, all of them being freeholders as well as residents in the city of New York, commissioners to make appraisement and determine the damages which the respective owners thereinafter mentioned of the lands thereinafter described will sustain by the occupation thereof in fee for the purpose of the said railroad;

91 "that said commissioners make appraisal and determine the damages which Samson Adolphus Benson will sustain by the said New York and Harlem Railroad Company, in taking in fee," etc. (Here follows a description in identical terms with that contained in the original petition of a strip of land 24 feet in width then owned by Samson Adolphus Benson.)

The order further directs that said commissioners be notified of their appointment and be required to name a day for meeting on the lands to view the premises required to be taken and directing them afterwards to convene at some suitable place by them appointed for the purpose of proceeding with the performance of the duties thereby required of them, and further providing that the said commissioners should cause at least 10 days notice to the owners of the said lands of the time for viewing the premises, and of the time and place of meeting so appointed by the commissioners, and further requiring each of the commissioners to take and subscribe in writing before said vice chancellor an oath or affirmation to fully perform the duties of the office of commissioner of appraisal according to the best of his ability, etc., and further requiring the said commissioners after viewing the premises, and without favor or partiality to appraise or determine the damages sustained by the respective owners and claimants of the said lands and real estate, and further requiring them to report the same in writing to the said vice chancellor, &c., with all convenient speed, "and so that their said report shall contain a minute and accurate description of the lands appraised, and may contain any other matter which the said commissioners may consider explanatory, necessary or desirable."

"And it is further ordered that * * * Benjamin L.

92 Benson be and he is hereby appointed to appear before the said commissioners to act in and on behalf of the said Samson Adolphus Benson, an infant, * * * and all further directions are reserved until the coming in of the report of said commissioners."

(5.) On the 16th day of July, 1832, the said commissioners filed their report reciting the order appointing them and the notice given to parties interested of the meeting of said commissioners as required in said order. "The commissioners named therein report that they have made appraisement and determined the damages which Samson Adolphus Benson will sustain by the New York and Harlem

Railroad Company occupying and taking in fee the lands set forth in said order of the vice chancellor, seven hundred and eighty feet long on each side by twenty-four feet in width upon the westerly side of a line drawn parallel to the westerly side of the Fourth avenue on the easterly side thereof, at the distance of thirty-eight feet therefrom; easterly by a line drawn parallel to the westerly side of the Fourth avenue at the distance of sixty-two feet therefrom; northerly by an old road leading from Harlem to King's Bridge, and southerly by lands of Peter Poillon; that Benjamin L. Benson appeared before us and acted in behalf and for account of the said Samson Adolphus Benson, an infant; that said Benjamin L. Benson and Isaac Adriance are the guardians of said infant; that said lands were leased to Leonard and Amos Jones two years, but which lease will expire the first day of April, 1832, subject to a ground rent of $3.23 per acre; that we award to Samson Adolphus Benson the sum of $104.68 for the fee of the land aforesaid, and to Leonard and Amos Jones the sum of $2.78 for their sole interest in the lands aforesaid."

93 (6.) On the 16th day of July, 1832, an order in said proceedings was duly filed and entered by direction of William T. McCoun, Esq., vice-chanceller, &c., reciting the filing of a report of said commissioners appraising and determining the damages that Samson Adolphus Benson and others will sustain by the occupation by the said The New York and Harlem Railroad Company in fee of certain lands, hereditaments and premises described in the petition of the New York and Harlem Railroad Company heretofore presented to the vice-chancellor. Said order directs that all the parties interested appear before the vice-chancellor on Monday, the 30th day of July, 1832, "when the said report of the said commissioners will be examined, and the said objections be heard in relation thereto, and the damages increased or diminished, providing that said vice-chancellor shall then and there be satisfied that injustice has been done," and further directs that all such parties who shall claim or do intend to claim an increase of the said damages, do furnish the vice-chancellor with their objections in writing, to the said report, and the grounds upon which they claim such increase and the amounts thereof, on or before the time above mentioned, and said order further directs that copies thereof should be published as notice to the parties interested, in three of the public newspapers in the city of New York, daily for 10 days at least.

(7.) On the 30th day of July, 1832, affidavits were duly filed, to wit: Of Edward S. Howard, to the effect that the said notice directed to be given in the order last above mentioned, had been regularly published in the New York Morning Courier and Enquirer daily for 10 days successively, commencing on the 18th day of July

94 last past, by Cornelius B. Marshall, to the effect that said notice had been published in the New York Advertiser and Journal for 10 days in succession, and by James Gill, to the effect that said notice had been published in the New York Evening Post,

daily for 10 days (Sabbath days excepted), commencing on the 17th day of July, 1832.

(8.) On the 26th day of October, 1832, an order was filed by the direction of William T. McCoun, Esq., vice-chancellor, &c., reciting the filing of the report of said commissioners of appraisal, determining the damages which Samson Adolphus Benson and others would sustain by the occupation by the said The New York and Harlem Railroad Company in fee of certain lands, hereditaments and premises described in the petition of the said The New York and Harlem Railroad Company, heretofore presented to the said vice-chancellor, and reciting that it appears that the said commissioners have made appraisal and determined the damages which Samson Adolphus Benson would sustain by the petitioners occupying and taking in fee the lands set forth in said order as belonging to him, an amount or sum of $104.68, and that Leonard and Amos Jones having a lease of the lands, 2 years of which is expired from the first of April, 1832, subject to a ground rent of $3.23 per acre, and that the said commissioners award to said lessees for their damages the sum of $2.78.

Said order further recites the order above mentioned, giving notice of hearing by the vice-chancellor of the parties interested and reciting the order of publication, and recites that said vice-chancellor has examined the said report of said commissioners of appraisement, and that no objections had been made to the same by any of the parties aforesaid except William Wilson, and the vice-chan-
95 cellor having increased the award to said William Wilson, the said report was as above modified, and everything therein contained, does ratify and confirm. "And it is further ordered that the said petitioners offer to the owners aforesaid the sums awarded to them, or deposit the same to the credit of said owners in the bank of the New York Chemical Manufacturing Company."

(9.) On the 28th day of December, 1832, certain receipts of the sum awarded by commissioners and approved by the court were filed among others, the following:

"New York, 26 Nov'r, 1832.—Rec'd of the New York and Harlem Railroad Company the sum of $104.68 in full of the amount awarded to Samson Adolphus Benson by the com'rs for taking away certain lands for the use of the company.

$104.68. BENJ'N L. BENSON,
Testamentary Guardian of Samson Adolphus Benson."

(10.) On the 28th day of December, 1832, the final order in said proceedings was duly filed, and on the eighth day of January, 1833, as required in said order, duly recorded in the office of the register of deeds in and for the city and county of New York, in Liber 292 of Conveyances, at page 1. Said final order is as follows:

Final decree in a court of chancery before the vice-chancellor, held December 28th, 1832, in the matter of the petition of the New York and Harlem Railroad Company in relation to certain lands required to be entered upon and taken possession of for the use of said company.

At a court of chancery held for the State of New York on the 28th day of December, 1832, present, William T. McCoun, vice-
96 chancellor of the first circuit.

In the Matter of the Petition of the New York and Harlem Railroad Company in Relation to Certain Lands Required to be Entered upon and Taken Possession of for the Use of said Company.

The New York and Harlem Railroad Company having, by their petition filed in the office of the clerk of this court on the 3d day of April, 1832, among other things set forth that for the purpose of constructing their single or double railroad or ways, and in order to keep the line, course, road or way thereof, the said petitioners required to be seized and possessed of the fee simple of the following lands and real estate, namely:

I. All that certain piece of land bounded west by a line drawn parallel to the westerly side of the 4th avenue on the easterly side thereof at the distance of 38 feet therefrom. Easterly by a line drawn parallel to the westerly side of the 4th avenue at the distance of sixty-two feet therefrom. Northerly by the old road leading from Harlem to Kings bridge and southerly by land of Peter Poillon being about 780 feet in length on each side by about 24 feet wide. The fee of which was in one Samson A. Benson, an infant under the age of fourteen years.

On the reading and filing of which petition the said vice-chancellor by an order bearing date the day and year last aforesaid, ordered and directed that the time and place of hearing the parties interested in the prayer of said petition should be Tuesday, the 24th day of April then instant at 10 o'clock in the forenoon of that day and at the court room in the city hall of the city of New York wherein the court of chancery should happen to be held, and that fourteen days before such period of hearing, a copy of said
97 orders and of the petition should be served upon the parties mentioned in said petition, and at a court of chancery held at the city hall in the city of New York on the 27th day of April, 1832, before the said vice-chancellor an order was made. On the reading and filing affidavits proving that notice had been given of the time and place of hearing, the parties interested in the land and real estate embraced in said petition pursuant to the order dated 6th April, 1832, and on hearing and filing the said petition it was further ordered by the said vice chancellor of the first circuit that John Leonard, of the city of New York, merchant; Charles Oakley, of the same city, merchant; and John B. Thorp, of said city, gentleman (all of them being freeholders as well as residents

of the city of New York), be and thereby were appointed the commissioners to make appraisements and determine the damages which the respective owners aforesaid of the different lands and grounds hereinbefore described, would sustain by the occupation thereof in fee for the purposes of the said railroad. And it was also therein ordered that notice of such appointment be given to said commissioners by serving a copy of such order upon them respectively. And that the said commissioners should thereupon name a day for a meeting on the lands to view the premises required to be taken and should afterwards convene at some suitable place, to be by them appointed for the purpose of proceeding in the performance of the duties thereby required of them; that the said commissioners should give at least ten days' notice to the owners of the said lands of the time for viewing the premises, and of the time and place of meeting so to be appointed by the commissioners, but if any such owner be absent or subject to any legal disabilities to contract, a copy of such notice might be left at the dwelling house or
98 residence of any such owner or at some public place on the lands to be appraised.

That each commissioner, before he enter upon the duties of his trust, should take and subscribe in writing before the said vice-chancellor an oath or affirmation in substance that he would faithfully discharge the duties of the office of commissioner of appraisement according to the best of his ability, and that the said commissioner should then proceed to view the premises as aforesaid, and without favor or partiality appraise and determine the damages sustained by the respective owners and claimants of the said lands and real estate, and report the same in writing to the said vice chancellor of the first circuit with all convenient speed, and so that their report should contain a minute and accurate description of the lands appraised and any matter which the said commissioners might consider explanatory, necessary or desirable.

And it was therein further ordered that Benjamin L. Benson be appointed to appear on behalf of Sampson Adolphus Benson, an infant.

And at a court of chancery, held for the State of New York, at the city of New York, on the 16th day of July, 1832, before his honor William T. McCoun, vice-chancellor of the first circuit. It appearing by the report of the commissioners appointed as aforesaid, bearing date the 9th day of July, 1832, that they had in pursuance of such order appraised and determined the damages which Samson Adolphus Benson would sustain by the occupation of said New York and Harlem Railroad Company in fee of certain lands, hereditaments and appurtenances particularly hereinbefore described in pursuance of the aforesaid order of 27th of April, 1832, a further order was made by the said vice chancellor of the first circuit, bearing date on that day, whereby it was ordered that the said re-
99 port be filed with the clerk of the court of chancery for the first circuit of the State of New York, for the perusal and inspection of all the parties aforesaid, and all others interested in such

appraisement and determination of damages, and that all such parties appear before such vice-chancellor on Monday, the 30th day of July, then instant, at 10 o'clock in the forenoon of that day, in the court room in the city hall in the city of New York, wherein the court of chancery might then happen to be held, when the said report of the commissioners would be examined and the said parties be heard in relation thereto, and the damages increased or diminished, provided the said vice-chancellor should then and there be satisfied injustice has been done.

And it is further ordered that all such parties as should claim, or did intend to claim, an increase of the said damages, furnish the said vice-chancellor with their objections, in writing, to said report, and the grounds upon which they claimed such increase, and the amount thereof, on or before that time.

And it was further ordered that a copy of said order be published, as notice to the parties interested, in three of the public newspapers of the city of New York daily for ten days at least. And at a court of chancery held for the State of New Yerk, at the city of New York, on 30th day of July, 1832, before his honor William T. McCoun, vice chancellor of the first circuit, it appearing by the affidavits of Edward S. Howard, Cornelius B. Marshall and Thomas Gill that the said order was published in three of the newspapers of the city of New York, daily, for at least ten days previous to said 30th day of July, 1832, and the said vice-chancellor having examined the report of the said commissioners of appraise-
100 ment whereby it appears that said commissioners have made appraisement and determined the damages which Samson Adolphus Benson will sustain by the petitioners occupying and taking in fee the land set forth in said petition as belonging to him to amount to the sum of $104.68, and that Amos Jones and Leonard Jones have a lease on the same, two years of which is unexpired from April 1st, 1832, subject to a ground rent of three dollars and twenty-three cents per acre, and that the said commissioners award to said lessees for their damages, the sum of two dollars and seventy-eight cents, and upon such examination of the report of said commissioners of appraisement, no objections having been made to the same by any of the parties aforesaid except William Wilson in respect to the smallness of the damages allowed by the said commissioners in their report.

Whereupon a further order was made by his honor the vice chancellor of the circuit, bearing date the 26th day of October, wherein he ordered, adjudged and decreed by virtue of the power and authority vested in him by the said act that the said report, with his amendment attached to the same increasing the damages of the said William Wilson as aforesaid, and everything therein contained, should stand ratified and confirmed, and it was therein further ordered that the said petitioners either pay to the owners aforesaid the sums of money so awarded to them as aforesaid, or deposit the same to the credit of the said owners in the bank of the New York Chemical Manufacturing Company in the city of New York.

And on reading and filing the certificate of Archibald Craig, cashier of the bank of the New York Chemical Manufacturing Company, bearing date the 17th day of November, 1832, whereby it appears that the said petitioners on that day deposited in
101 said bank to the credit of Amos Jones and Leonard Jones the sum of two dollars and seventy-eight cents, and on reading and filing the receipt of Benjamin L. Benson, testamentary guardian of Samson Adolphus Benson, whereby it appears that he has received from the said petitioners the sum of one hundred and four dollars and sixty-eight cents awarded to him as aforesaid.

And on motion of Mr. Charles Edwards, of counsel for the said petitioners, it is ordered, adjudged and decreed, and his honor, the vice-chancellor of the first circuit, by virtue of the power and authority vested in him by the act of the legislature of the State of New York, entitled "An act to incorporate the New York and Harlem Railroad Company, passed the 25th day of April, 1831," doth order, adjudge and decree that under and by virtue of the proceedings herein detailed and referred to, the said corporation of the New York and Harlem Railroad Company have become and are entitled to be seized and possessed in fee simple of all such lands or real estate hereinbefore particularly described and in relation to which the appraisement of damages has been made as aforesaid, and may enter upon, take and use the same for the purposes of said road, and shall be seized thereof and possessed in fee simple upon this order or decree being recorded in the office of the register of deeds in and for the city and county of New York.

JOHN WALWORTH, Clerk. [L. S.]

Recorded January 8, 1833.
Request of Isaac Adriance.

(11.) On the 16th day of February, 1833, a final decree setting forth all of said proceedings was duly signed, enrolled and filed.

102 Resolutions of the Common Council.

Approved by the Mayor October 11, 1831.

"*Resolved*, That the maps presented by the New York and Harlem Railroad Company, so far as the same locate the route of the said railroad from the north side of Twenty-third street through the centre of Fourth avenue to Harlem river, and the branch of the same through the centre of One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, be approved, upon condition that neither this approval nor anything herein contained shall be construed into a consent to the said company to construct the said railroad; but that the said company shall first obtain the consent of the mayor, aldermen and commonalty of the city of New York before they commence the construction of said road."

(Here follows diagram marked page 103.)

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104 Now York and Harlem Railroad.

Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the Mayor, Aldermen, and Commonalty of the City of New York, parties of the second part:

Whereas, an ordinance of the common council of the city of New York was passed by the board of aldermen on the sixteenth day of December, last, and by the board of assistants on the 19th day of December last, and approved by the mayor of said city on the twenty-second day of December last, which ordinance is in words and figures following, to wit:

A Law to Authorize the New York and Harlem Railroad Company to Construct their Railway.

Section 1. Be it ordained, etc., That the New York and Harlem Railroad Company be, and they hereby are, permitted to construct and lay down, in pursuance of their act of incorporation, a double or single track or railroad, or railway, along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity with a map now on file in the register's office, and a branch thereof along One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, provided that the width of such double railroad or way shall not exceed twenty-four feet.

Section 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New York and Harlem Railroad Co., it shall appear to the mayor, alder-
105 men and commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue (of which the said mayor, aldermen and commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said mayor, aldermen and commonalty, forthwith provide a remedy for the same, satisfactory to the said mayor, aldermen and commonalty; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down; and, should the said directors decline or neglect to obey such requisition, the said mayor, aldermen and commonalty, may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed, and the avenues or streets restored as aforesaid, at the expense of the said railroad company.

Section 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and

the speed of the same, as well as all other power reserved to the said mayor, aldermen and commonalty, by the act of incorporation of the said company, or any part thereof be, and the same are hereby, expressly retained and reserved.

SECTION 4. That it shall expressly be incumbent on the said New York and Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets now or hereafter to be made (which will be intersected by the embankments or
106 excavations of the said railroad), and which, in the opinion of the common council, the public convenience requires to be arched or bridged, and also to make such embankments or excavations as (in the opinion of the common council) may be required to make the passage over the railroad and embankments, at the intersected cross streets easy and convenient for all the purposes for which streets and roads are usually put to; and also, that the said company shall make at their own like cost and charges, all such drains and sewers as their embankments and excavations may (in the opinion of the common council) make necessary; all which work to be done under the like requisition, and under like disabilities, as in the second section of this ordinance mentioned. And further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulation of the avenue and road through which said railroad passes.

SECTION 5. That it shall be incumbent on the said New York and Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation; and unless they commence and complete the same in the periods of time for the said commencement and completion in said incor, ation specified, that then the consent of the common council, and all the powers and privileges given in this ordinance, shall cease and be null and void.

SECTION 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or, if any time after the construction of the said railroad, the same should be discontinued, or not kept up and in repair as a good and sufficient railroad, that then the strip of land to be taken for the
107 said railroad should be thrown open and become a part of the street or public avenue, without any assessment on the owners of the adjoining land or the public therefor.

SECTION 7. That no building shall be erected on the said strip of land to be taken for said railroad, and that a railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railing or fences on the edges of the excavations, as the common council shall, from time to time, deem necessary to prevent accidents and loss of lives to our fellow-citizens.

SECTION 8. That this ordinance shall not be considered as binding on the common council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing

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(promising, covenanting and engaging, on their part and behalf, to stand to, abide by and perform all the conditions and requirements in this ordinance contained) as the mayor and the counsel of the board shall, by their certificate approve, and not until such instruments shall be filed, so certified, in the comptroller's office of this city.

Passed by the board of aldermen, December 16, 1831.

Passed by the board of assistants, December 19, 1831.

Approved by the mayor, December 22, 1831.

Now, this agreement witnesseth, that for and in consideration of the premises, and in pursuance of the requirements of the eighth section of said ordinance, the said parties of the first part do hereby for themselves and their successors, promise, covenant and engage to and with the said parties of the second part and their successors and assigns, to stand — abide by and perform all the conditions and requirements in the said ordinance contained.

108 & 109

In witness whereof, the said parties of the first part have hereunto affixed their corporate seal and caused the same to be signed by their vice-president (in the absence of their president), and attested by their secretary, the day and year aforesaid.

JOHN MASON, [L. S.]
Vice-President.

Witness:
ISAAC ADRIANCE.
Secretary *pro tem.*

(Here follows diagram marked page 110.)

111 & 113 Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are true copies of the judgment roll, papers, notice of appeal and case and exceptions in this action on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, March 22, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorneys for Defendants-Appellants.

It is hereby consented that the within-printed case on appeal may be ordered filed as and for the original case on appeal, as settled herein.

Dated New York, March 22, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

It is so ordered.

Dated New York, March 25, 1901.

ABM. R. LAWRENCE, J. S. C.

113 At a term of the appellate division of the supreme court for the first department, held at the court house of the appellate division in the county of New York, on the 29th day of April, 1901.

Present: Hon. Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch, J. J.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Order of Affirmance.

The defendants having appealed to this court from the judgment in this action, entered in the office of the clerk of the county of New York on the 18th day of January, 1901, in favor of the plaintiff and against the defendants, for $4,483.85 damages and costs and for an injunction, and the said appeal having come on to be heard, and having been duly argued by Ira A. Place, Esq., for the appellants, and Alfred B. Cruikshank, Esq., for the respondent, and due deliberation having been had thereon;

Now, on motion of Atwater & Cruikshank, attorneys for the plaintiff-respondent, it is

Ordered, that said judgment be and the same hereby is affirmed, with costs and disbursements to the respondent.

114 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Judgment of Affirmance.

The defendants above named having appealed to the appellate division of this court from the judgment entered herein on the 18th day of January, 1901, in the office of the clerk of the county of New York, in favor of the plaintiff and against the defendants, and said appeal having been duly heard by said appellate division, and the said judgment having been affirmed, with costs to the plaintiff, by the appellate division, as appears by the remittitur from said appellate division, duly filed in the office of the clerk of the county of New York on May 7th, 1901, and the costs of the plaintiff having been duly taxed at the sum of ninety-six and 55/100 dollars;

Now, on motion of Atwater & Cruikshank, attorneys for plaintiff, it is

Adjudged, that the said judgment entered herein on January 18th, 1901, be and it hereby is in all things affirmed; and it
115 is further adjudged, that the plaintiff, Alice I. Birrell, recover of the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, the sum of ninety-six and 55/100 dollars, costs of said appeal, and that execution issue therefor.

Dated New York, May 7th, 1901.

WILLIAM SOHMER, Clerk.

116 Supreme Court, Appellate Division, First Department, April, 1901.

Charles H. Van Brunt, P. J.; William Rumsey, Morgan J. O'Brien, George L. Ingraham, Edward W. Hatch.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants-Appellants.

Judgment affirmed, with costs. No opinion. (Van Brunt, P. J., dissenting.) 60 App. Div. Reports, 630.

STATE OF NEW YORK,
County of New York,
} ss:

Charles C. Paulding, being duly sworn, deposes and says: That he is an attorney and counselor-at-law, and is of counsel for the de-

fendants in the above-entitled action, and is familiar with the different proceedings in the action; that the foregoing memorandum was handed down by the appellate division upon the decision of the appeal herein, and no opinion was rendered.

CHARLES C. PAULDING.

Sworn to before me this 23d day of September, 1901.

JOHN A. MATTISON,
Notary Public, New York County, N. Y.

117 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Notice of Appeal to the Court of Appeals.

SIRS: Please take notice that the defendants above named and each of them hereby appeal to the court of appeals from the judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of New York county on the 7th day of May, 1901, upon an order entered in the office of the clerk of the said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of New York county on the 18th day of January, 1901, in favor of the above-named plaintiff and against the defendants, which judgment awarded the plaintiff herein an injunction unless the defendants paid the sum of seven thousand and fifty dollars fee damages, and further awarded the plaintiff a money judgment against the defendants for the sum of eighteen hundred and eighty-three and 33/100 dollars, be affirmed, with two hundred and
118 ninety-two and 67/100 dollars costs to the plaintiff, and from each and every part of said judgment.

Dated borough of Manhattan, N. Y. city, N. Y., May 22, 1901.

Yours, &c.,

IRA A. PLACE,
Attorney for Defendants-Appellants.

Office and post office address, room 417 Grand Central station, borough of Manhattan, New York city, N. Y.

To William Sohmer, Esq., county clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.; and

Atwater & Cruikshank, Esqs., attorneys for plaintiff-respondent, 43 Cedar street, borough of Manhattan, New York city, N. Y.

119 In the Court of Appeals.

ALICE I. BIRRELL, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.

Stipulations under Sections 3301 and 1353 of the Code.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the judgment roll, papers, notice of appeal to the appellate division of the supreme court, case and exceptions, of the order of the appellate division, and of the judgment entered thereon, and of the notice of appeal to the court of appeals, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, N. Y., September 24, 1901.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff-Respondent.
IRA A. PLACE,
Attorney for Defendants-Appellants.

120 Memorandum Opinion of Court of Appeals.

ALICE I. BIRRELL, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY ET AL., Appellants.

Birrell *v.* N. Y. & Harlem R. R. Co., 60 App. Div. 630, reversed.

(Argued November 18, 1902; decided February 24, 1903.)

Appeal from a judgment of the appellate division of the supreme court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at special term.

Ira R. Place, Alexander S. Lyman and Thomas Emery for appellants.

Alfred B. Cruikshank, Henry G. Atwater and John C. Thomson for respondent.

Judgment reversed and complaint dismissed without costs; no opinion.

Concur: Parker, Ch. J., Bartlett, Haight, Martin, Vann and Werner, JJ. Not sitting: Gray, J.

121 At a special term, part II, of the supreme court, held in and for the county of New York, at the county court house, in said county, on the 31st day of March, 1903.

Present: Hon. Samuel Greenbaum, justice.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The defendants herein having appealed to the court of appeals of the State of New York from a judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of the county of New York on the 7th day of May, 1901, upon an order entered in the office of the clerk of the said appellate division on the 6th day of May, 1901, adjudging that the judgment entered in this action in the office of the clerk of the county of New York on the 18th day of January, 1901, be affirmed, with costs, and the said court of appeals having directed that the said judgment be reversed and the complaint dismissed without costs, and having directed that the record of the proceedings be remitted to this court to be
122 enforced according to law, and the said remittitur having been duly filed in the office of the clerk of the county of New York; now, on motion of Ira A. Place, Esq., attorney for the defendants, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, it is

Ordered, that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that this order and the judgment to be entered hereon be annexed to the judgment roll.

S. G., J. S. C.

123 Supreme Court, New York County.

ALICE I. BIRRELL, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The judgment herein, in favor of the plaintiff and against the defendants, having been entered in this court on the 18th day of January, 1901, upon a decision of the Hon. Abraham R. Lawrence, J., for an injunction and for the sum of four thousand four hundred and eighty-three and eighty-five hundredths dollars ($4,483.85) and the defendants having appealed from said judgment to the appellate division of the supreme court for the first department, and the said

judgment having been affirmed by the said appellate division and judgment of affirmance having been accordingly entered therein on the 7th day of May, 1901, and the said defendants having appealed therefrom to the court of appeals, and the said court of appeals having sent hither, its remittitur, filed herein on the 31st day of March, 1903, by which it appears that the said court of appeals has reversed the said judgment so appealed from, without costs, and has given judgment accordingly, and has remitted its judgment to this court to be enforced according to law, and this court having, by order dated the 31st day of March, 1903, and duly entered herein,
124 ordered that the said judgment of the court of appeals be made the judgment of this court; now, on motion of Ira A. Place, Esq., attorneys for the defendants herein, it is

Adjudged that the judgment of said court of appeals be, and the same hereby is, made the judgment of this court; and it is further

Ordered and adjudged, that the said judgments of the supreme court herein so appealed from be, and the same hereby are, reversed and the complaint dismissed, without costs.

Judgment signed and entered this 31st day of March, 1903.

THOMAS L. HAMILTON, Clerk.
M. J. D.

124½ [Endorsed:] Supreme court, New York county. Alice I. Birrell, plaintiff, against The New York & Harlem Railroad Co., *et al.*, defendants. Judgment on remittitur from court of appeals. Ira A. Place, defendants' att'y.

125 In the Supreme Court of the United States.

ALICE I. BIRRELL, Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants in Error. } Assignment of Errors.

Afterwards, to wit, on the seventh day of January, in the year of our Lord, one thousand nine hundred and four, in this same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes Alice I. Birrell, plaintiff in error herein, and by her attorneys and counsel Henry G. Atwater and Alfred B. Cruikshank, says:

That in the record, proceedings, decision and final judgment of the court of appeals of the State of New York, and of the supreme court of the State of New York aforesaid, in the above entitled suit or action, there is manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment aforesaid given, was given by the court of appeals of the State of

New York against the said Alice I. Birrell, plaintiff in error, and in favor of The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error; whereas, by the law of the land the said judgment ought to have been given for the said Alice I. Birrell against
126 the said New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

II. That the said court of appeals of the State New York erred in holding and decidin,g that the complaint of the plaintiff in error should be dismissed.

III. That the said court of appeals of the State of New York erred in holding and deciding that, under the statute authorizing or requiring the erection and maintenance of the elevated railroad structure and the operation thereon of trains as complained of by the plaintiff in error, the plaintiff in error has no remedy against the defendants in error and defendants in error below, herein; thereby holding and deciding that the said plaintiff in error might be and has been deprived of *his* property by said defendants without due process of law; the said court of appeals thus holding and deciding in violation of the Constitution of the United States and especially of section I, article XIV of the amendments to said Constitution.

IV. That the said court of appeals of the State of New York erred in holding that chapter 339 of the Laws and Statutes of 1892 of the State of New York, is constitutional and that it does not offend against that portion of the fourteenth amendment to the Constitu-
127 tion of the United States, providing that a person shall not be deprived of property without due process of law; whereas in fact and in law the said act and statute is repugnant to section I, of article XIV of the amendments to the Constitution of the United States; and further that whereas the property of the said plaintiff, as shown by said record and proceedings consists of rights and easements of light, air and access in and over Park or Fourth avenue, a public street in the city of New York, appurtenant to the premises of the said plaintiff in error, abutting on said avenue, the said court of appeals of the State of New York erred in deciding in favor of sustaining the validity of said act and statute of said State, the effect of which has been to deprive said plaintiff of said property without due process of law.

V. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under chapter 339 of the Statutes of 1892 of the State of New York, namely, the authority to take by or on behalf of the defendants in error and defendants below, the said plaintiff's property, consisting of rights and easements of light, air and access appurtenant to her said premises, without compensation to her and without due process of law, in violation of section I of article XIV of the amendments to the Constitution of the United States.

128 VI. That the said court of appeals of the State of New York erred in holding and deciding that the said State had authority and that the authority exercised by the State and under the statute aforesaid was valid to compel or allow defendants in error to maintain a railroad viaduct and to operate trains of cars thereon in front of said property rights and easements, of the said plaintiff in error and that the defendants in error were under no liability to compensate said plaintiff in error therefor, or for the injury inflicted upon her said premises by reason of such maintenance and operation, and that the taking of a portion of the property of the plaintiff in error in the manner complained of, was and could be made valid by statute, that is by chapter 339 of the Laws of 1892 of the State of New York; and that said holding and decision of said court of appeals, was, and is repugnant to section I of article XIV of the amendments to the Constitution of the United States.

VII. That the said court of appeals of the State of New York erred in holding that chapter 339 of the New York Laws of 1892 is constitutional and that it does not contravene section 10 of article I of the Constitution of the United States forbidding the impairment of the obligation of contracts; whereas in fact and in law the said act is repugnant to the said section in that it does not impair the obligation of a contract, namely, the contract under which Park or Fourth avenue in the city of New York was dedicated as a public street
129 in and by the deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827, and set forth in the record of the proceedings herein; and said statute further impairs the obligation of the contract existing among the parties to this action arising from the fact that the said parties all claim title under said Peter Poillon through conveyances which recognize and establish the property rights of the plaintiff in error as aforesaid.

VIII. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said statute and under chapter 339 of the Laws of the State of New York, of the year 1892, whereby the easements and rights of the property of the plaintiff in error aforesaid were taken and appropriated by defendants in error and thereby she was deprived of said property rights and easements without compensation, for the reason that said authority was repugnant to section 10 article I of the Constitution of the United States, in the respect that it impairs the obligation of said contracts in last assignment referred to.

130 IX. That the said court of appeals of the State of New York erred in holding and deciding that the defendants in error were and are under no liability to compensate the plaintiff in error for the damages and injury inflicted upon her said premises by reason of either the erection, maintenance and operation of said viaduct structure or the operation of trains in front of plaintiff's premises and in holding and deciding that said defendants were and are pro-

tected from such liability by the authority of a statute of said State, namely, chapter 339 of the Laws of 1892 thereof, such decision being repugnant to the Constitution of the United States and to section 10 of article I and to section I of article XIV thereof.

Wherefore, the said Alice I. Birrell, plaintiff in error, prays that the said judgment of the said court of appeals of the State of New York be reversed, annulled and altogether held for nothing and that she may be restored to all things which she has lost by occasion of the said judgment, etc., and that she may have such other and further relief, according to law, as to the court may seem just and proper.

HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York.

130½ [Endorsed:] In the supreme court of the United States. Alice I. Birrell, plaintiff in error, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error. Orig. Assignment of errors. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within assignment of errors is hereby admitted this 30th day of Jan'y, 1904. Rec'd copy Jan'y 30th, '04. Ira A. Place, att'y for deft R. R. Co's. Attorney and solicitor for the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

131 In the Supreme Court of the United States.

ALICE I. BIRRELL, Plaintiff in Error & Original Plaintiff, *against* THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants in Error & Original Defendants.	Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Alice I. Birrell, respectfully shows:

That your petitioner is a resident and citizen of the city and State of New York, and was at all the times hereinbefore mentioned, the owner of certain valuable land and premises situated in the borough of Manhattan, city, county and State of New York, and abutting upon Park avenue, a public street in said borough, and city, was at the times hereinafter mentioned the owner of certain easements in said avenue of light, air, access, etc.; that prior to the commencement of the above entitled original suit or action the defendants

therein, the defendants in error above named, The New York & Harlem Railroad Company and The New York Central and Hudson River Railroad Company, had been for a long time maintaining and operating an elevated railroad in said street or avenue in front of your petitioner's said premises.

That on or about January 27, 1897, your petitioner commenced said action against said defendants in the supreme court of the State of New York to recover the damages sustained by your peti-
132 tioner by said maintenance and operation, whereby your petitioner claimed that the said easements had been taken and impaired by said defendants unlawfully and without due compensation, and to recover an injunction against the further maintenance and operation of said elevated railroad, as appeared by the complaint of your petitioner in said action. Said defendants appeared and as a defense to the complaint in said suit or action, interposed an answer setting up in substance the provisions of certain acts of the legislature of the State of New York, namely, chapter 339 of the Laws of 1892, and amendments thereof, as command and authority to defendants to maintain and operate said elevated railroad.

That under the practice in said New York supreme court, no further pleading and no reply to said defense was allowed or required.

That said action came to trial thereafter in said supreme court at a special term thereof on the 5th day of November, 1900, before Hon. Abraham R. Lawrence, justice, and thereupon and on January 14, 1901, the trial court overruled said defense and held the same to be invalid, and gave judgment in favor of the plaintiff for an injunction and for $4483.85 damages, and for other relief.

That upon appeal duly taken by both parties to the appellate division of the supreme court for the first department, the said judgment was duly affirmed and judgment of affirmance thereof entered on May 7, 1901.

That from said judgment of affirmance both parties thereupon appealed to the court of appeals of the State of New York, the same being the highest court of said State in which a decision in
133 the said suit could be had. Whereupon the said court of appeals on February 24, 1903, made a final judgment or decree in said suit or action, directing that the said judgment of the appellate division of the supreme court so appealed from be reversed and plaintiff's complaint be dismissed and that the record be remitted to the supreme court of the State of New York to be enforced according to law; that said record was thereupon so remitted accordingly, and thereafter and on March 31, 1903, final judgment was entered in and by said supreme court in obedience to the judgment of the court of appeals, and according to the law and practice of the State of New York whereby it was adjudged that said judgment of the court of appeals be made the judgment of the supreme court, and that the judgment previously rendered in favor of your peti-

tioner by said supreme court be reversed and your petitioner's complaint be dismissed as aforesaid.

That in said court of appeals there was drawn in question the validity of the said statutes of the State of New York and the authority exercised thereunder by defendants on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of the validity of said statute and the authority exercised thereunder; that in said court of appeals it was claimed by your petitioner that the said acts of the legislature directing the taking of private property without due process of law and therein offended against the provision of the fourteenth amendment of the Constitution of the United States, and that they contravened the provisions of the Constitution of the United States, which forbid
134 the impairing of the obligation of a contract, namely, section 10 article 1, of said Constitution.

That thereupon said court of appeals in said suit or action and in its decision therein overruled the said claims of your petitioner and decided in favor of the validity of said statute and the authority exercised thereunder.

Wherefore, your petitioner prays for a writ of error directed to the supreme court of the State of New York, commanding that court to send a record of the proceedings in the said suit or action aforesaid, and all things concerning the same, to the justices of the Supreme Court of the United States and for the usual citations and supersedeas to the end that the record of the proceedings being inspected the said justices of the Supreme Court of the United States may cause further to be done therein to correct all errors what of right and according to law and the law and Constitution of the United States ought to be done.

And your petitioner will ever pray.

ALICE I. BIRRELL.
HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Attorneys and of Counsel for Plaintiff in Error,
43 Cedar Street, New York City.

135 STATE OF NEW YORK, }
County of New York, Southern } ss:
District of New York, }

Alice I. Birrell, being duly sworn, says:

That she is the plaintiff in error herein; that the foregoing petition is true to the best of her knowledge information and belief.

ALICE I. BIRRELL.

Sworn to before me this 15th day of December, 1903.

FRED KOCH,
Notary Public, N. Y. Co.

Allowed this 7th day of January, 1904.
ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

136 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which Alice I. Birrell is plaintiff and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company are defendants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals in the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered February 24, 1903, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between Alice I. Birrell, plaintiff, and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants, and which has been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of the statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the damage of the said Alice I. Birrell, as by complainant's complaint appears; we being willing that error, if any hath been, should be duly
137 corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if a judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of January, in the year of our Lord one thousand nine hundred and four.

Allowed by
ALTON B. PARKER,
Chief Judge of the Court of Appeals of
the State of New York.

137½ [Endorsed:] In the Supreme Court of the United States. Alice I. Birrell, plaintiff in error & original plaintiff, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error & original defendants. Orig. petition and writ of error. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within petition and writ of error is hereby admitted this 30th day of January, 1904 (Over) —— ——, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company Received supreme court N. Y. Feb. 1st 1904 Rec'd copy Jan'y 30/04 Ira A. Place att'y for def't R. R. Cos.

138 Citation.

UNITED STATES OF AMERICA, ss:

To the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of New York, wherein Alice I. Birrell is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 7th day of January in the year one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

138½ [Endorsed:] In the Supreme Court of the United States. Alice I. Birrell, plaintiff in error & original plaintiff, against The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants in error & original defendant- Orig. citation. Atwater & Cruikshank, attorneys for plaintiff in error, 43 Cedar street, borough of Manhattan, New York city. Service of a copy of the within citation is hereby admitted this 30th day of January 1904 (Over) —— ——, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company Ira A. Place att'y for def't R. R. Cos. Rec'd supreme court N. Y. Feb. 1, 1904. Rec'd copy Jan'y 30/04.

139 Know all men by these presents: That we, Alice I. Birrell, of the county of New York, and State of New York, as principal, and The United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the New York and Harlem Railroad Company, and the New York Central and Hudson River Railroad Company, both corporations organized under the laws of the State of New York, in the full and just sum of five hundred dollars ($500 00), to be paid to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, their certain attorney, successors or assigns; to which payment well and truly to be made, the said Alice I. Birrell binds herself, her heirs, executors and administrators, and the said The United States Fidelity and Guaranty Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of December, in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at a plea in the court of appeals of the State of New York, held at Albany, New York, on February 24, 1903, in a suit depending in the supreme court of the State of New York, between the said Alice I. Birrell, plaintiff, and The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants, a judgment upon return from said supreme court was rendered against the said Alice I. Birrell and in favor of the said New York and Harlem Railroad
140 Company and The New York Central and Hudson River Railroad Company, dismissing her complaint without costs, and the said Alice I. Birrell having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Alice I. Birrell shall prosecute said writ of error to effect, and answer all costs if she fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

ALICE I. BIRRELL.

{ Seal of the United States Fidelity & Guaranty Company. Incorporated 1896. }

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, Manager.

Attest: GEORGE E. HAYES, Attorney-in-fact.

Sealed and delivered in the presence of
FRED KOCH.

141 STATE OF NEW YORK, County of New York, } ss:

On this 26th day of December, 1903, personally appeared before me Alice I. Birrell to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

[Seal of Fred. Koch, Notary Public, New York County.]

FRED KOCH,
Notary Public, New York County.

STATE OF NEW YORK, County of New York, } ss:

On the 18 day of Dec., in the year 1903, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Sylvester J. O'Sullivan, further said that he was acquainted with George E. Hayes, and knew him to be the attorney-in-fact of said company; that the signature of said George E. Hayes, subscribed to the within instrument, is in the genuine handwriting of said George E. Hayes, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Sylvester J. O'Sullivan.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

STATE OF NEW YORK, County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Alonzo G. Oakley whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a commissioner of deeds in and for the city of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such commissioner,

and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court and county, the 19th day of Dec. 1903.

[Seal of New York.]

THOS. L. HAMILTON, Clerk.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the ninth day of November, A. D., 1903, at the office of the company, in the city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Leonidas Dennis, or Charles W. Young, or George E. Hayes, or W. C. Schryver, or Gilman Ashburner, or H. C. Nash, attorneys-in-fact of this company in the State of New York, be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, }
County of New York, } ss:

I, George E. Hayes, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said resolution.

Given under my hand and the seal of the company, at the city of New York, this 18 day of Dec. 1903.

{Seal of the United States Fidelity & Guaranty Company. Incorporated 1896.}

GEORGE E. HAYES,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company Rendered to the Department of Justice, Washington, D. C., at the Close of Business, September 30, 1903.

Assets.

Investments, stocks and bonds (market value)	$1,933,501.56
Cash on hand and in banks	117,033.44
Collateral loans	159,935.00
Real estate	264,920.67
Loans on mortgage	41,925.00
Mortgages and other collateral ac. salvage	4,000.00
Agents' balances, fidelity and surety, less commissions	226,913.30
Agents' balances, burglary, less commissions	50,136.91
Due for subscriptions, department of guaranteed attorneys	33,300.05
Advanced ac. contracts, secured	399,395.26
Interest due and accrued	17,756.31
	$3,348,915.50

Liabilities.

Capital stock paid in cash	$1,695,200.00
Cash collateral deposits	96,148.64
Surplus and reserve	1,457,566.86
	$3,248,915.50

STATE OF NEW YORK, County of New York, } *ss.:*

George E. Hayes, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of September 30th, 1903, and that the financial condition of said company is as favorable now as it was when such statement was made.

GEORGE E. HAYES.

Subscribed and sworn to before me this 18 day of Dec. 1903.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

142 [Endorsed:] Alice I. Birrell and the United States Fidelity and Guaranty Company to the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company. Orig. Penalty $500.00. Dated, December 18, 1903. Approved Ja'y 7 1904 Alton B. Parker Ch. J. Rec'd N. Y. supreme court Feb. 1 1904 Atwater & Cruikshank, attorneys at law, 43 Cedar street, New York city. Service of a copy of the within undertaking is hereby admitted this 30th day of January 1904. —— —— attorney and solicitor for defendants in error The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company. Rec'd copy Jan'y 30/04. Ira A. Place att'y for def't R. R. Co's.

143 UNITED STATES OF AMERICA:

Supreme Court.

STATE OF NEW YORK, County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court in said county, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, ending with No. 124 contain a true and complete transcript of the record and proceedings had in said supreme court and in the court of appeals of the State of New York in the cause of Alice I. Birrell, plaintiff in error and plaintiff below, against The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error and defendants below, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the defendants in error and undertaking to prosecute said writ of error and copy of the opinion of the said court of appeals, all of which were filed in the office of said clerk on the 1st day
M. J. D. of February A. D. 1904, and constitute the return to said writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 2nd day of February, A. D. 1904.

(Seal of New York.)

THOS. L. HAMILTON,
Clerk of the Supreme Court in the County of New York.

144 [Endorsed:] In the Supreme Court of the United States. *Patrick Kierns*, plaintiff in error, against The New York & Harlem Railroad Company & ano., defendants in error. County clerk's certificate.

Endorsed on cover: File No. 19,259. New York supreme court. Term No. 202. Alice I. Birrell, plaintiff in error, *vs.* The New York and Harlem Railroad Company & The New York Central & Hudson River Railroad Company. Filed March 3rd, 1904. File No. 19,259.